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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

By OCTAVIUS PICKERING,
COUNSELLOR AT LAW.

VOLUME XVIII.

BOSTON:
LITTLE, BROWN AND COMPANY.
1866.

Entered according to act of Congress, in the year 1840
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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THIS VOLUME OF REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

ATTORNEY-GENERAL
HON. JAMES T. AUSTIN.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF SUFFOLK AND NANTUCKET, MARCH
TERM 1836, AT BOSTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE,	}	JUSTICES.
HON. SAMUEL PUTNAM,		
HON. SAMUEL S. WILDE,		
HON. MARCUS MORTON,		

WILLIAM BOYNTON *et al. versus* JOHN D. DYER.
RUTH BOYNTON *versus* JOHN D. DYER.

A petition to a judge of probate to allow an appeal from his decree, and a formal decree granting such petition, are not usual in practice, nor requisite to the validity of an appeal.

On an appeal from a Court of Probate, the appellant is restricted to the points specified in his reasons of appeal, but not to the same arguments, views or evidence which were presented before the Court of Probate.

In general, if a guardian neglects to put his ward's money at interest, he will be charged with interest ; and in cases of gross delinquency, with compound interest .

A guardian is entitled to a reasonable time in which to make an investment of his ward's money.

Where a guardian had settled two accounts in the Probate Court without charging himself with interest, and no adjudication was made on this subject, it was held, that on the presentation of his third account he should be charged with interest from an early period after his appointment, in the same manner as if no previous account had been settled.

But if the question of interest had been put in issue and decided on the settlement of the former accounts, it could not be revised so long as the former decrees remained in force.

Where a party interested in the estate of a ward, certified his approval of an account in which the guardian had not charged himself with interest, but no

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discussion or controversy was had on this subject, it was held that he was not precluded from having the error corrected when the guardian presented a subsequent account for allowance in the Probate Court. But where a ward, seven months after coming of age, certified that his guardian's final account was correct, and gave him a release of all demands, he was not permitted to open the settlement because the guardian had not charged himself with interest.

In a guardian's account the interest for a year should be added to the principal, and the current expenses of the year should be deducted from the amount, and the balance will be the principal for the next year ; and so on from year to year.

THESE cases were appeals from decrees of the Court of Probate for the county of Suffolk, passed on the 11th of March, 1833.

The decree in the first case was one allowing the account of John D. Dyer as guardian of Ruth Boynton, a person *non compos mentis* ; and her children, William, John and Ruth, appealed from the decree, for the following reasons : —

1. Because the judge refused to open and re-examine former accounts settled by the guardian, while two of the appellants were minors under the guardianship of Dyer and the other was absent in the city of New York, (they being solely interested in the estate of their mother,) in which accounts, as they allege, were errors, overcharges and omissions, which they have not had an opportunity to prove.

2. Because the guardian, from the time of his appointment to the present time, has had in his hands a large sum of money belonging to the estate of the ward, for which he ought to charge himself with interest, but the judge allowed him to settle his several accounts without charging himself with interest.

The second case was an appeal from a decree allowing the account of Dyer as guardian of Ruth Boynton, the daughter. The reasons of the appeal were : —

1. Because the judge allowed the guardian to settle his accounts without charging himself with interest on a large sum of money belonging to the ward's estate, which he had in his hands from the time of his appointment to the time of the settlement of his account, in March 1833.

2. Because the judge permitted the guardian to diminish the ward's estate, when the income of her real estate and interest on her money in the hands of the guardian, were more than sufficient for her maintenance and education.

3. Because the guardian was allowed one dollar and fifty cents per week for the board of the ward, when her services in his family were a sufficient compensation. Boynton
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Field, for the appellants. In the first of these two cases March 11th the guardian should be charged with interest on the money in his hands, and the former accounts should be opened for that purpose. Since 1823, the trust fund has been, on an average, about 800 dollars. *St.* 1783, c. 38, § 4 ; 2 *Kent's Comm.* (1st edit.) 187, 188 ; *Reeve's Dom. Rel.* 325 ; *Fay v. Howe*, 1 *Pick.* 547 ; *Saxton v. Chamberlain*, 6 *Pick.* 422 ; *De Peyster v. Clarkson*, 2 *Wendell*, 77 ; *Longley v. Hall*, 11 *Pick.* 120 ; *Stearns v. Stearns*, 1 *Pick.* 157 ; *Baylies v. Davis*, 1 *Pick.* 206. In the second case the fund in the guardian's hands is less, but the same principle is applicable.

S. D. Parker, for the appellee, objected that the appeal could not be sustained, because there had not been a petition to the judge of probate to grant the appeal, nor a decree granting it ; *St.* 1817, c. 190, § 7, 8, 9 ; that it did not appear that the judge of probate had been requested to open the former accounts, nor that the question of allowing interest had been made when those accounts were settled, and that consequently the judge was not in error in not adjudicating upon those questions ; that the former decrees, as no appeal from them had been taken, could not now be questioned ; that there was no evidence that the guardian had received any interest or made use of the money in his hands ; and that the account settled in 1829 was approved of by William Boynton, as appeared by his certificate thereon, and he at least is estopped to object that interest was not charged. He cited *Stearns v. Brown*, 1 *Pick.* 530 ; *Storer v. Storer*, 9 *Mass. R.* 37 ; *Wyman v. Hubbard*, 13 *Mass. R.* 232.

MORTON J. delivered the opinion of the Court. The ap- March 14th appeal by William Boynton and others is properly taken, and the case is regularly before us. The appellants, being presumptive heirs of the ward, are so interested in her estate, that they have a right to claim an appeal from a decree affecting it. No other person competent to make an appeal has any interest in the question. The party *non compos* is presumed to be incapable of doing it. The appellants are "persons aggrieved

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ed" by the decree, within the meaning of the statute of 1817, c. 190, § 7. *Penniman v. French*, 2 Mass. R. 140.

It appears that they claimed the appeal within "one month" after the decree was made; gave their bond to prosecute the appeal within "ten days" thereafter; filed their reasons of appeal within another "ten days" then next ensuing, and duly notified the adverse party thereof. This appears of record. The aggrieved parties having complied with the conditions imposed by the statute, are entitled to their appeal. It is their right, and does not depend on the discretion of the judge of probate. And if he cannot directly disallow the appeal, he cannot do it by omitting to perform any act essential to its allowance. But we see no omission in this case. We believe it would be a novelty to make a formal decree granting an appeal. Enough appears here to show that the appeal was claimed and granted, according to the intent of the statute.

The effect of an appeal properly taken is to vacate the decree or judgment appealed from. *Campbell v. Howard*, 5 Mass. R. 376; *Murdock, Appellant*, 7 Pick. 327. Hence a new judgment or decree affirming or reversing the former one, must be made in this Court. The case is to be tried anew here, and each party may adduce new evidence and rely upon new grounds to support the claim or the defence. But in the mode of trial there is a manifest difference between an appeal from a common law court and from the Court of Probate. In the former, the whole case is to be tried over again, as if it never had been tried. In the latter, the appellants are restricted to such points as are specified in their reasons of appeal. These are the only subjects which the adverse party has been notified to be prepared to investigate. Every thing else, not having been objected to, is impliedly assented to and presumed to be correct.

But although the appellants must be confined to their reasons of appeal, yet they are not restricted to the same arguments, or the same views, or the same evidence, which were presented before the Probate Court. The very object of the appeal may be to supply the accidental or inevitable absence of witnesses or documents on the first trial. Persons who

were not even present when the decree was made, have a right to appeal.

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The decree appealed from was the allowance of the third account of the guardian. And the only objection to this account, which is presented by the reasons of appeal, is the omission of interest. The appellants contend, that the guardian ought to have charged himself with interest on the ward's money in his hands. It is not necessary to the full investigation of this question, to open either of the former accounts, or to go behind either of the former decrees. They may be regarded as valid and conclusive, and yet if there were any omissions or errors in them, they may properly be corrected in a subsequent account. This proposition does not extend to matters which were put in issue and decided in the former decree. So far, it is *res judicata*, and cannot be revised while the former decree remains in force. *Saxton v. Chamberlain*, 6 Pick. 423. If therefore the guardian is liable for interest, it should be charged to him in this account, not only from the last settlement, but from the commencement of his guardianship. No adjudication having been made upon this point, it is now as much open as if no account had been settled.

Nor will the assent of William Boynton to the second account, limit our inquiries to the time of rendering that account. The other appellants who were then minors, certainly cannot be bound by his agreement. And even William Boynton should not be precluded from correcting any errors or oversights which he then committed. Had this matter been discussed by the parties, and had they adjusted a controverted question by a compromise, it would have stood on different ground, and we know of no reason why the parties should not be bound by their agreement. But no interest was charged in either of the accounts, and there is no reason to suppose that the subject attracted the attention of the parties, or that their minds were brought to act upon it at all. It is the common case of an error or omission in the settlement of an account, which always may be corrected. *Stearns v. Stearns*, 1 Pick. 206 ; *Saxton v. Chamberlain*, 6 Pick. 423.

We are now brought to the consideration of the question, whether the guardian shall be charged with interest. And upon this we entertain no doubt.

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The general doctrine in relation to trustees is, that they are bound to take the same care of the trust fund as a discreet and prudent man would take of his own property, to manage it for the exclusive benefit of the *cestui que trust*, and to make no profit or advantage out of it for themselves; to keep it, at all times when practicable, profitably invested, and punctually to account for the income as well as the principal. If any of these duties are neglected, the loss must fall on the trustee and not on the *cestui que trust*. Hence if the trustee, through gross carelessness or ignorance, make a bad investment, and the whole or a part of the fund be lost, he will be holden to replace it. And if he neglect to invest at all, he will be chargeable with the income which would have been derived from a proper investment. And Chancellor *Kent*, 2 Comm. (1 edit.) 188, says, "if he neglects to put the ward's money at interest, but negligently, and for an unreasonable time, suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and, in cases of gross delinquency, with compound interest." These reasonable and equitable principles are not only the established doctrines of English chancery, but they have been adopted throughout this country. *Newton v. Bennet*, 1 Brown's C. C. 360; *Perkins v. Baynton*, *ibid.* 375; *Treves v. Townshend*, *ibid.* 384; *S. C.* 1 Cox, 51; *Pocock v. Reddington*, 5 Ves. 794; *Raphael v. Boehm*, 11 Ves. 92, 13 Ves. 407 and 590; *Dornford v. Dornford*, 12 Ves. 127; *Ashburnham v. Thompson*, 13 Ves. 402; *Tebbs v. Carpenter*, 1 Madd. Ch. R. 297; *Stacpoole v. Stacpoole*, 4 Dow's P. C. 209; *Dunscomb v. Dunscomb*, 1 Johns. Ch. R. 508; *Schieffelin v. Stewart*, *ibid.* 620; *Manning v. Manning*, *ibid.* 527; *Holridge v. Gillespie*, 2 Johns. Ch. R. 30; *Davoue v. Fanning*, *ibid.* 252; *Smith v. Smith*, 4 Johns. Ch. R. 281; *Evertson v. Tappen*, 5 Johns. Ch. R. 498; *Rogers v. Rogers*, 1 Hopkins, 515; *Clarkson v. De Peyster*, *ibid.* 424; *S. C.* in error, 2 Wendell, 77; *Lovell v. Briggs*, 2 New Hampsh. R. 218; *Church v. Marine Ins. Co.* 1 Mason, 345; *Mills v. Goodsell*, 5 Connect. R. 475; *Prevost v. Gratz*, 1 Peters's Circ. C. R. 364.

According to the rules laid down by our courts, executors and administrators have no right to charge interest on money

advanced by them, and are not required to invest the funds which come into their hands in their official capacity. Hence they are not chargeable with interest, except where they actually receive it or make some profitable use of the funds, or are guilty of negligence in accounting for them. *Storer v. Storer*, 9 Mass. R. 37; *Wyman v. Hubbard*, 13 Mass. R. 232; *Stearns v. Brown*, 1 Pick. 530. But the duties, and of course the liabilities of guardians and of executors and administrators, are different, and in some respects very dissimilar. It is the duty of the former to invest the funds of the ward in a safe and permanent manner, paying only so much as is necessary to defray his current expenses. It is the duty of the latter, in the most speedy manner practicable, to convert the estate of the deceased into money and to pay it over to the creditors, heirs or legatees. They must therefore generally keep the funds on hand to meet the demands against the estate, and to prepare for the prompt settlement and distribution of the estate.

The appellee, during his long guardianship, had the management and use of the personal property of the ward. For this he is chargeable with interest. It only remains to determine in what manner it shall be computed. The rule is, in ordinary cases, to charge simple interest. But in cases "of gross delinquency" compound interest is allowed. In *Schieffelin v. Stewart*, Chancellor *Kent* lays down this rule: if the trustee suffer the trust money to lie idle, he is chargeable with simple interest, but if he convert it to his own use or employ it in his own business or trade, he is liable for compound interest. In *De Peyster v. Clarkson*, 2 Wendell, 77, the subject is fully and learnedly discussed, and substantially the same doctrine adopted. In *Robbins, Judge, v. Hayward*, 1 Pick. 529 and note, compound interest was allowed; and in *Stearns v. Stearns* the propriety of the rule was recognized. Were it necessary, we should not hesitate to apply it to this case, for we think it comes within the principle. But we believe it is not. For we think the annual disbursements exceeded the income, and if so, there was no interest to be added to the principal. There is nothing better settled, than that the annual income, whether it be interest or rent, shall be applied to the

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discharge of the current expenses. And if it fails to meet them, a portion of the capital must be taken for the purpose, and thus the new capital upon which interest is to be computed will be diminished at the end of each year. Let the interest be computed for one year, add it to the principal, then deduct the expenses from the amount, and the balance will be the new capital upon which the next year's interest is to be computed, and so on from year to year. This is equally just with the rule laid down in *Clarkson v. De Peyster*, and much more simple.

But the interest should not commence from the appointment, nor from the receipt of the ward's property. The guardian should have a reasonable time in which to make the investment. In *Clarkson v. De Peyster* six months were deemed sufficient. In *Schieffelin v. Stewart* nearly two years were allowed. Each claim must depend on its own peculiar circumstances. No general rule would do justice in all cases. The guardian settled his first account within one year. This showed diligence and promptness on his part, and we think forms the proper point from which to commence the computation of interest.

Let the account be settled by the above rules, the decree be made to conform to it and be remitted, for further proceedings, to the Probate Court.

The second case comes entirely within the same principles. Let the account be stated accordingly, reducing the board of the ward to one dollar per week. This weekly allowance however is to extend back only to the last settlement, that decree being conclusive upon this subject.

Note. Dyer had been the guardian of John Boynton, and in April 1829, he presented to the Probate Court the second account of his guardianship, embracing the balance from his first account, settled in July 1822, and moneys received and paid from that time to November 7th, 1828, the day when the ward came of age. The guardian had not charged himself with interest on the money in his hands, but the ward certified that this second account was correct and gave the guardian a receipt in full of all demands, bearing date the same

day on which this account was passed in the Probate Court. In June, 1834, Boynton cited Dyer into the Probate Court to settle a final account, claiming a balance due for the interest received by Dyer. The judge of probate decreed that Dyer owed nothing to Boynton, and from that decree Boynton appealed. But inasmuch as the appellant, seven months after he had become of age, made a deliberate settlement with the appellee, and gave him the receipt in full of all demands, and no fraud or oppression was alleged, this Court dismissed the appeal.

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HANNAH LEARNED *versus* PLINY CUTLER.

S. L. joined with his wife in executing a deed, with covenants of warranty on his part, which contained the following clauses : " I, S. L. and H. L., wife of S. L., (in her right as to one quarter part of the hereinafter described and granted premises,) in consideration of &c., do hereby give, grant, sell and convey unto B. all right, title and interest, which we have in and to " certain land ; " three undivided quarter parts of the land hereby conveyed, belong to S. L. in his own right, in fee, and the remaining fourth part belongs to S. L. and to H. L., his wife, in fee, in her right ; " " to have and to hold the aforegranted premises to B," &c. ; " in witness whereof we, S. L., and H. L., my wife, in token of our conveyance of all right, title and interest, whether in fee or in freehold, in the premises, have hereunto set our hands," &c. It was *held*, that the wife was barred by such deed, of her right to dower in the three undivided fourth parts of the land which belonged to her husband. [See Revised Stat. c. 60, § 7.]

WRIT of dower. The parties stated a case. It appeared, that on June 30th, 1824, the demandant and one Samuel Learned, who then, and until his decease in 1832, was the husband of the demandant, executed a deed containing the following clauses :

" Know all men by these presents, that I, Samuel Learned of &c., and Hannah Learned, wife of said Samuel, (in her right as to one quarter part of the hereinafter described and granted premises,) in consideration of thirty thousand dollars paid by the city of Boston, the receipt whereof we do hereby acknowledge, do hereby give, grant, sell and convey unto the said city of Boston, all right, title and interest which we have in and to " the premises described in the writ, together with other adjacent lands. " Three undivided quarter parts of each

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of said pieces of land hereby conveyed, belong to said Samuel Learned, in his own right, in fee, and the remaining fourth part of each of said pieces belongs to said Samuel Learned and to said Hannah, his wife, in fee, in her right. To have and to hold the aforegranted premises to the said city of Boston and their assigns, to their use and behoof forever. And I, Samuel Learned, do covenant with the said city of Boston and their assigns, that I am lawfully seised in fee of the aforegranted premises as specified above, and I and the said Hannah are lawfully seised in fee of the aforegranted premises as above specified, that they are free of all incumbrances, that we have a good right to sell and convey the same to the said city of Boston, and that I will warrant and defend the same premises to the said city of Boston and their assigns forever, against the lawful claims and demands of all persons. In witness whereof, we, the said Samuel Learned and Hannah Learned, my wife, in token of our conveyance of all right, title and interest, whether in fee or in freehold, in the premises, have hereunto set our hands and seals," &c.

The consideration mentioned in the deed was the estimated value of the land conveyed.

The tenant was in possession of the premises described in the writ, deriving his title thereto, through sundry mesne conveyances, from the city of Boston. The demandant claimed dower in the three undivided fourth parts thereof, of which her deceased husband was seised in fee.

If the Court should be of opinion, that the demandant was dowable of the premises, judgment was to be rendered accordingly ; if otherwise, the demandant was to become nonsuit.

March 11th. *H. H. Fuller, Washburn and T. Bigelow*, for the demandant, cited *Fowler v. Shearer*, 7 Mass. R. 14 ; *Powell v. Munson*, 3 Mason, 349 ; *Catlin v. Ware*, 9 Mass. R. 218 ; *Lufkin v. Curtis*, 13 Mass. R. 223 ; *Hall v. Savage*, 4 Mason, 273 ; 4 Kent's Comm. 58 ; *Leavitt v. Lamprey*, 13 Pick. 382 ; *Charles v. Andrews*, 9 Mod. 151 ; *Birmingham v. Kirwan*, 2 Sch. & Lefr. 452 ; 4 Wheeler's Pract. Abr. 576 , *Lithgow v. Kavenagh*, 9 Mass. R. 161 ; Stearns on Real Actions, 288, 289 ; Jackson on Real Actions, 325, 326 ; Story's Pleadings (Oliver's edit.), 408, 409 ; *Stinson v*

Sumner, 9 Mass. R. 143 ; *Gooch v. Atkins*, 14 Mass. R. 378 ; *Park on Dower*, 192, 334 ; *Jackson v. O'Donaghy*, 7 Johns. R. 247 ; *Jackson v. Vanderheyden*, 17 Johns. R. 167 ; *Lampel's case*, 10 Coke, 49 ; *Gilbert's Tenures*, 26 ; *Croade v. Ingraham*, 13 Pick. 33.

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J. Pickering, for the tenant, cited *Anc. Chart.* 99, 304 ; *Feare v. Snou*, *Plowden*, 514 ; *Stearns v. Swift*, 8 Pick. 532 ; *Gordon v. Haywood*, 2 New Hampsh. R. 402 ; 4 *Bythewood's Convey.* 173.

WILDE J. delivered the opinion of the Court. This is a writ of dower, and it is admitted by the facts agreed, that the demandant is entitled to recover unless she is barred by the deed made by her jointly with her late husband, to the city of Boston, under which the tenant claims. The case, therefore, must turn upon the construction to be given to that deed. March 14th

The general question, as to what acts of the wife shall be sufficient by our laws to bar her claim of dower, has been frequently considered by this Court, and is well settled. She must not only join with her husband in a deed of conveyance of the land by executing the deed, the conveyance being made by him, but the deed must contain apt words of grant or release on her part ; and if it does, it will bar her right of dower, although she had no vested title in the land at the time of the conveyance, and no title passed from her to the grantee. The grant or release of the wife operates by way of estoppel or extinguishment of her right, so as to bar any future claim of dower which may accrue to her after the death of her husband. The usual form is for the wife simply to relinquish or release her right of dower ; but words of grant are equally efficacious and proper to bar her right ; for in neither case does her deed pass any title to the estate. So it is not necessary that she should release or grant her right of dower *eo nomine*, any other words showing an intention on her part to relinquish her dower, will be sufficient. And if she joins her husband in the sale, and undertakes to convey the land jointly with him, this generally would be a sufficient indication of her intention to exclude herself from any claim of dower. By joining in the words of grant she must be understood to give or intend to give all the right and title she was capable of giving, whether

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by way of passing an estate or extinguishing or barring a right depending on a contingency. It is, therefore, no objection, that the wife has nothing which can pass by grant ; for if it can operate in any other way, so as to confirm the title of the grantee, it will be sufficient. If it were otherwise, an express release or conveyance of the right of dower would have no legal operation ; for the wife cannot convey or release any right which she does not possess at the time of the conveyance or release. But by joining her husband in the sale, she bars her right of dower by the plain construction of the *St. 1783, c. 37, § 5*, by which it is provided, that the widow of any vendor shall be entitled to dower unless she has joined her husband in the sale of the land, or has otherwise lawfully barred or excluded herself from her dower. Now the wife cannot in any way more fully join her husband in a sale, than by joining in the words of grant ; and where she does thus join, she is clearly barred, unless there is some reservation in the deed, of her right of dower, or unless it appears from the language of the deed, that such reservation was intended to be made.

Upon these principles, the construction of the deed in question appears very clear. The demandant joined her husband in the sale of the land in which she demands dower, and they expressly give, grant, sell and convey all their right, title and interest therein. It makes no difference that the demandant had a title to a part in her own right in fee ; the words of conveyance extend to the whole ; and it makes no difference, as has been already stated, that the wife had no vested right of dower in her husband's share of the premises at the time of the conveyance ; so that the conveyance is as effectual to bar her dower, as it was to pass any vested rights she might then have in any part of the land.

But it has been argued, that these general words are restrained and limited by the words afterwards introduced at the close of the deed. The words are : " In witness whereof we the said Samuel Learned and Hannah Learned, my wife, in token of our conveyance of all right, title and interest, whether in fee or in freehold, in the premises, have hereunto set our hands and seals," &c.

But we think it is manifest that this clause in the deed, so far

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from limiting and restricting the general words of grant, confirms their legal operation, and shows, that the deed was intended by the parties to operate so as to bar the husband's right as tenant by the curtesy in his wife's share, and to bar her right of dower in her husband's share. The word *freehold* can have no other meaning. Whether the husband had, at the time of the conveyance, a vested right of freehold in his wife's share of the lands does not appear ; but if he had, the fact would not vary the construction of this clause in the deed. The husband and wife were seised in fee, in her right, of her share of the estate ; and that share would clearly pass by the general words of the deed, and by the husband's covenants to that effect ; so that the word *freehold* seems more particularly applicable to the wife's contingent right of dower than to the husband's right as tenant by the curtesy ; but in no respect can it be considered as limiting the general words of conveyance.

Demandant nonsuit.

ANDREW CUNNINGHAM *et al. versus* JOHN MAGOUN
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Where the evidence is clear and strong and the law is explicitly stated to the jury, and they decide against the law, the Court will set aside the verdict, because it must, in such case, be apparent, that the jury have either unintentionally erred, by mistaking the terms of their instructions, or have misapprehended the weight of the evidence, or have mistaken their duty, or abused their trust ; but this will be more readily presumed in the case of a single verdict, than where there have been two verdicts the same way.

But where the question is purely matter of fact, and there is evidence for the jury to weigh and balance, and presumptions are to be raised and inferences drawn, and the jury may be presumed to have fairly exercised their judgment, the Court will not feel authorized to set the verdict aside, although the Court, upon the same evidence, would have decided the other way ; more especially where the verdict is against the party having the burden of proof.

ASSUMPSIT for goods sold and delivered. Holwell, one of the defendants, did not appear. The other defendant, John Magoun, pleaded, that he never promised jointly with Holwell. At the first trial of this cause, a verdict was returned for the defendant ; but a new trial was granted, on the ground that the verdict was against the evidence.

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The second trial was before *Wilde J.* It was admitted, on the part of the plaintiffs, that the bargain was made in the name of Holwell only, and that the goods were charged to him on the books of the plaintiffs.

Witnesses were produced on both sides, to prove and disprove, respectively, the existence of a partnership between Holwell and Magoun. The jury returned a verdict for the defendant. The plaintiffs moved for a new trial, on the ground, that the verdict was against the evidence.

March 12th. *C. G. Loring* and *F. C. Loring*, for the plaintiffs.

J. Pickering and *S. D. Parker*, for the defendant Magoun.

March 14th. *SHAW C. J.* delivered the opinion of the Court. The principles upon which new trials are granted, are now pretty well settled ; and in general the difficulty arises, not so much from the uncertainty of the rules, as from the almost infinitely varied combinations of circumstances to which they are to be applied.

The great principle, which is at the basis of jury trial, is never to be lost sight of, that to all matters of law, the court are to answer, to all controverted facts, the jury. The verdict of a jury is practically to be taken for truth.

Formerly this distinction was effectually preserved, by special pleading, whereby juries were compelled to answer yes or no, to a precise fact, averred on one side and denied on the other, and by attaints and other expedients, where juries departed from the truth, through prejudice or corrupt motives. But by the prevailing use, in modern practice, of general declarations and general issues, the jury is in most cases left to find a general verdict, which necessarily embraces the whole matter of law and fact. The mode of trial therefore necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant, as they shall find certain facts proved to their satisfaction or otherwise, by the evidence. The consequence obviously is, that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact ; and, therefore, as they may mistake the instructions of the court, or may take the law into their own

hands, imagining it to be severe or inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of trial safe and tolerable, there must exist a power somewhere, to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent, that the jury have either unintentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust. This will be more readily presumed in case of a single verdict, than in case of a second verdict the same way.

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But where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way. This consideration is somewhat strengthened, where the verdict is against the party having the burden of proof.

After an examination of the evidence, the judge concluded thus: In the present case, though there was strong evidence to prove a partnership, yet there was evidence the other way, the burden of proof was upon the plaintiffs, and two juries on the evidence have decided against them. We do not feel warranted in saying that they have done wrong.

Judgment on the verdict.

THOMAS G. ATKINS *versus* GEORGE HOWE *et al.*

Goods consigned by the defendants to an auctioneer, were sold by him to the plaintiff on the condition of sale, that no allowance should be made for damage unless applied for within three days from the sale, when the bills were to be settled. It was *held*, that the condition of sale limited the liability of the defendants for such damage, as well as of the auctioneers, to three days from the sale, notwithstanding the damage was not discovered till after the lapse of such time.

In an action by the plaintiff against the defendants to recover back the price of such goods, evidence to prove that according to the custom of merchants, goods were returned by purchasers at auction to the owners, and received by them or allowances made, after the expiration of the three days, if within a reasonable time after the sale, was *held* to be inadmissible.

Held also, that a purchaser was precluded from objecting, that the time limited in the conditions of sale was unreasonably short.

ASSUMPSIT to recover the sum of \$282.59, paid by the plaintiff to the defendants for a case of French printed muslins. The declaration consisted of several counts, alleging that the goods were not the articles of merchandise described, and that they were damaged. The trial was before *Wilde J.*

The defendants, who were originally the owners of the goods in question, consigned them to Coolidge & Haskell, to be sold by auction; and accordingly, on April 26th, 1833, they were offered for sale on the following conditions of sale: "Under \$100, cash, \$100 and upwards, six months satisfactory indorsed notes. No allowance made for damage on sample packages, nor on any other packages, unless applied for within three days from the sale, at which time the bills must be settled." These conditions were printed on the catalogue of the goods to be sold, and were read by the auctioneers before the sale commenced.

The goods in question, which were described in the catalogue as superfine French printed muslins, were purchased by the plaintiff at the auction, and were returned to the defendants on the 27th of June following. The defendants refused to accept them, but told the plaintiff, who insisted on leaving them, that they might remain on storage.

In this state of the case, the judge ruled, that the conditions of sale were binding on the plaintiff, and that he had no right to return the goods after the expiration of the three days from the time of the sale.

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The plaintiff contended, that the limitation of three days in the conditions of sale, did not apply to the *owners* of goods sold at auction, and offered evidence to prove, that according to the custom of merchants in Boston, goods were returned by purchasers at auction to the owners, and received by them, or allowances made, after the expiration of the three days, if within a reasonable time after the sale. This evidence was objected to by the defendants, and rejected by the judge.

If this evidence was rightly rejected, the plaintiff was to become nonsuit ; otherwise a new trial was to be granted.

Cooke, for the plaintiff, cited *Paterson v. Gandasequi*, 15 March 9th. East, 62 ; 3 Chitty on Commerce and Manuf. 109, 110, 111, 303, 304 ; *Shepherd v. Kain*, 5 Barn. & Ald. 240 ; *Bridge v. Wain*, 1 Stark. R. 504 ; *Jones v. Bowden*, 4 Taunt. 847.

B. Sumner, for the defendants.

SHAW C. J. delivered the opinion of the Court. This is March 21st an action of assumpsit, on an implied warranty, alleged to have been made by the defendants to the plaintiff, upon a sale of certain French prints ; and the plaintiff, in various counts, alleges, that they were not the article of merchandise described, and that they were damaged. The sale having been made through the agency of auctioneers, the plaintiff now claims to recover of the defendants, as owners of the goods.

It is to be understood from the report and the course of the argument, that there was no complaint that the goods were not what they were described to be in the catalogue, to wit, superfine French printed muslins, but that they were damaged, and that the damage was not discovered till several weeks after the sale. It was conceded, that it was one of the conditions of sale expressed upon the catalogue, and stated by the auctioneers before the commencement of the sale, that no allowance would be made for damage, unless applied for within three days of the sale, at which time the bills must be settled. It was contended, that this limitation did not apply to the *owners* of the goods, but only to the auctioneers, and the plaintiff offered to prove, that according to the custom of trade in this city, goods were returned by purchasers at auctions and received by the owners, and an allowance made, after the expiration of three days, if within a reasonable time after the sale.

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The plaintiff has argued the case as if there were two distinct contracts with the plaintiff, one by auctioneers, and one by the owners of the goods, and that the restriction in question was only intended to prevent the plaintiff from proceeding against the auctioneers after the expiration of three days. But the Court are all of opinion, that this position is wholly untenable. The rule is, that where one makes a contract with an agent, and the principal is not disclosed, such party, when he discovers the principal, may consider the contract as made with the principal, and hold him responsible accordingly. *Paterson v. Gandasequi*, 15 East, 62. But when the party does so elect to proceed, he must consider the contract, in all respects, as if made directly with the principal, through the instrumentality of the agent. All the conditions and stipulations made by the agent, are binding upon the principal, and enure to his benefit, as if he had contracted personally. Such being the case, the stipulation which was made, that all claims for damages must be made within three days, was a part of the contract of sale which limited the defendants' liability, and by which the plaintiff was bound.

In considering that this was not inserted merely for the benefit of the auctioneers, and that it must be considered that there were not two distinct contracts made, we do not mean to say that such a stipulation might not have been made in apt and proper terms. Suppose it had been stated, that the auctioneers would not hold themselves personally responsible after three days, and after the settlement of the bills, but after that time all claims for damage or otherwise were to be made on the owners, such a provision might have been good.

It was argued, that the limitation of three days was unreasonably short ; but the answer seems a plain one, that these were the vendors' terms, and the plaintiff, by acceding to them and purchasing under them, has precluded himself from taking this objection.

It seems to the Court also, that the evidence of custom, as offered, was plainly inadmissible. Custom is often of importance, to show how parties are to be understood, in the language which they have used ; but this is not such a case. Here was a claim for damage. The terms of sale were, that

all claims for damage must be made within three days, and before the bills were settled. The usage had no tendency to alter or affect the terms or meaning of this stipulation. It was one which the parties might lawfully make, and if it varied from the common custom, it shows that these parties intended to make terms differing from those usually made; *conventio legem vincit*. They had a right to make a law for themselves, and are bound by it.

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Plaintiff nonsuit.

WILLIAM B. KENT *et al.* versus THE MANUFACTURERS' INSURANCE COMPANY.

Two days before the expiration of a policy, fully insuring a vessel on time, the defendants made a policy insuring the same vessel, at and from Boston to Charleston, the second policy providing, that if the assured should have made prior insurance upon the vessel, then the defendants should be chargeable only for so much as the amount of such prior insurance should be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another. The vessel sailed from Boston before the expiration of the first policy, but was lost after it had expired. It was *held*, that the second policy attached, notwithstanding the first policy continued in full force till after the vessel had sailed from Boston, and that the defendants were consequently liable for the loss.

ASSUMPSIT upon a policy of insurance.

At the trial, before *Wilde J.*, it appeared that on October 20th, 1831, the plaintiffs effected insurance for the sum of \$2000 on the schooner *Argo*, valued at that sum, excluding the premium, for one year, at the office of the Commonwealth Insurance Company in Boston.

The policy of insurance which is the subject of this action, was dated October 18th, 1832. By this policy the defendants insured, for whom it might concern, the sum of \$2100 on the same vessel, valued at that sum including premium, at and from Boston to Charleston, S. C., at and from thence to Nassau River, East Florida, and at and from thence to New York, beginning the adventure upon the schooner as aforesaid, and to continue during the voyage, on the vessel, until she should be arrived and moored at anchor twenty-four hours in safety. The premium was five per cent.

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The second policy contained the following clauses : " And it is hereby agreed, that if the assured shall have made any other insurance upon the schooner aforesaid, prior in date to this policy, then the said insurance company shall be chargeable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another ; and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage, as they shall be exonerated from by such prior insurance, provided that no return premium shall be made for any passage whereon the risk has once commenced. And in case of any insurance upon the said schooner, whether it be for the whole or part of the voyage subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made."

The vessel sailed from Boston for Charleston, either upon the 18th or 19th of October, 1832, and was never afterwards heard of.

The judge instructed the jury, that the policy made by the defendants attached upon the subject of insurance, at the expiration of the prior policy ; that they were therefore to ascertain and determine whether the vessel was lost before or subsequently to the 20th of October, 1832, at noon ; and that as they should find this fact, they were to render a verdict for or against the defendants.

Under this instruction, the jury found a verdict for the plaintiffs, for the whole sum insured in the policy.

If the instruction was right, in point of law, judgment was to be rendered on the verdict for the plaintiffs ; but if the Court should be of opinion, that the policy declared on *never* attached, or attached to an amount which the first policy *did not cover*, then, in the former case, the verdict was to be set aside, and a verdict to be entered for the defendants, and, in

the latter case, the verdict was to be reduced so as to cover the amount for which the defendants should be chargeable after deducting the sum covered by the first policy.

Sohier, for the defendants, cited *Seamans v. Loring*, 1 Mason, 127 ; *Murray v. Insurance Co. of Penn.* 2 Wash. C. C. R. 186 ; *Brown v. Hartford Ins. Co.* 3 Day, 58 ; *Bousfield v. Barnes*, 4 Campb. 228.

Fletcher, for the plaintiffs, cited *Columbian Ins. Co. v. Lynch*, 11 Johns. R. 233 ; *Murray v. Insurance Co. of Penn.* 2 Wash. C. C. R. 186 ; *Warder v. Horton*, 4 Binney, 539 ; *Perkins v. New England Mar. Ins. Co.* 12 Mass. R. 214 ; *Newby v. Reed*, 1 W. Bl. 416 ; *Lee v. Massachusetts F. & M. Ins. Co.* 6 Mass. R. 208 ; *Potter v. Marine Ins. Co.* 2 Mason, 475 ; *New York Ins. Co. v. Thomas*, 3 Johns. Cas. 1 ; 1 Phillips on Ins. 74, 326, 505 ; 2 Phillips on Ins. 224, 225, 420.

PUTNAM J. delivered the opinion of the Court. The defendants contend that the policy underwritten by them never attached, inasmuch as the vessel was fully covered by the prior policy, at the time when the policy which is now sued was made ; which prior policy continued in full force for one or two days, after the vessel sailed from Boston ; and that as the risk or adventure was to begin at Boston, and the plaintiffs were fully insured while the vessel was at Boston, and until noon of the 20th of October, 1832, the defendants could not be charged, on the ground that the risk commenced or the policy attached while the vessel was at sea. These views were very ingeniously enforced and illustrated by the counsel for the defendants. And it must be admitted, that if the vessel had been lost in Boston, or before noon of the 20th of October, 1832, the defendants would not have been liable upon the policy subscribed by them.

Contracts are to have such reasonable construction as will best carry into effect the intent of the parties, consistently with the rules of the law. No question is made in regard to the right of property which the plaintiffs had in the vessel. They were unquestionably the owners of her. The clause in relation to prior policies is not intended to prevent the owner from procuring subsequent policies upon the same vessel. It is not introduced for the purpose of rendering the subsequent policies

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null and void. On the contrary, it supposes, that they may be lawfully made ; and the clause regulates the extent of the liability which the underwriters upon the subsequent policies incur. If, for example, the subsequent policy covers the same vessel, voyage and risks as were covered by the prior policy, the assured would not by the terms of the contract be entitled to recover any thing upon the subsequent policy. Such was the case of *Seamans v. Loring*, 1 Mason, 127. But if part of the voyage was protected by the prior policy, and the second policy should in terms embrace the whole voyage, the underwriters upon the second policy would be liable for the loss sustained in that part of the voyage not covered by the first policy. Thus, if the plaintiffs had procured a policy on the schooner from Charleston, S. C., to Florida, and afterwards had procured a policy at and from Boston to Charleston, S. C., and from thence to Florida, and from thence to New York, and the vessel had been lost on her passage from Charleston to Florida, the writers of the last policy would not be liable for that loss ; because it was assumed by the underwriters of the first policy. But suppose the loss had happened on the passage from Florida to New York, the underwriters of the last policy would be liable, notwithstanding the assured had nothing at their risk in the passage from Charleston to Florida. And this result would arise from a fair construction of both policies.

It would not follow, therefore, because the assured were fully covered for a part of the voyage by one policy, that they might not be covered by another and subsequent policy for the residue, although the description of the risk in the subsequent policy embraced the whole voyage. And we cannot think that it makes any difference, whether the part covered by the prior policy was at the beginning or the middle of the voyage.

The subject matter of the insurance was the vessel, then lying in Boston and bound upon the voyage described. The prior policy covered the first part, expressing it in time. For two days (say) the schooner was protected by the first policy ; for the rest of the voyage she was protected by the last. This matter is to be apportioned in the words of the contract, viz. the defendants shall be chargeable only for so much as the

amount of the prior insurance may be deficient towards fully covering the property at risk.

But the defendants insist that they are not chargeable at all, because the prior policy covered the vessel at and from Boston, and as the adventure was to commence at and from Boston, the second policy never had any force or vitality ; and that we should consider the case in the same light as if the plaintiffs had had no vessel there which was the subject of insurance. No other objection is made, excepting what grows out of this prior policy ; and that paper is produced by the defendants as evidence, that the plaintiffs had no insurable interest to which the policy subscribed by them could attach.

Now we think that both policies should be taken together. The latter refers to the former, hypothetically, and prescribes the liabilities which should arise from each, in the event of there being a prior insurance. The case stands then as if the plaintiffs had desired to get insurance upon the whole voyage, including the risk at and from the port of Boston, where the vessel then was, and the defendants had undertaken to insure for the whole voyage, excepting only for the loss that might happen within two days then next to come, during which time the vessel was protected by the prior policy. The defendants, in effect, say, that notwithstanding the adventure is to commence at Boston, and to continue during the whole voyage, yet it is understood, that we do not begin to assume our liability until after the expiration of the prior policy.

Taking all the facts proved, it seems to be in vain to say there was no subject matter of insurance to which the defendants' policy applied, considering both policies together, as from the defendants' own showing we are bound to do. The assured obtained the protection they sought, for the whole voyage, according to the terms of the second policy ; and the defendants can exonerate themselves only against the loss which should be proved to fall within the prior policy. The defendants agree to begin just at the moment when the prior policy shall end.

And it is of no consequence at what part of the voyage the risk was assumed by the one or the other policy, providing always that when one was inoperative the other was in force.

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In the case above supposed, the prior policy would protect the vessel from Charleston to Florida. The last policy would be in force for all the rest of the voyage. It would revive at Florida, although it slept between Charleston and Florida. The agreement we think applies as well to time as to the amount for which the property was insured; to the port of loading, as well as to the port of discharge; to the first, as well as to the last part of the voyage. It was the clear understanding of the parties, that by the one or the other policy, the plaintiffs should be fully covered. The facts being ascertained by the jury, or otherwise, there is no difficulty in determining the liability of the underwriters upon the several policies.

This construction appears to all the members of the Court to be reasonable, and according to the intent of the parties, to be collected from the whole case submitted.

The judgment is therefore to be rendered for the plaintiffs, according to the verdict.

SARAH STEARNS *versus* AUGUSTUS H. FISKE.

The decision by a single judge of this Court, of a question of fact upon the hearing of a probate appeal, may be excepted to, and may be revised by the whole Court, if the judge fully reports the evidence. It is, however, within the discretion of the judge, at such hearing, to sustain a motion for the revision of his judgment as to matters of fact, and report the evidence, or not.

Where, upon the application of the widow of an intestate for letters of administration, it appeared, that she was under the influence of a person who was indebted to the estate in a large amount, and who was charged with combining with the intestate in his lifetime to defraud his creditors, and that such application was made at the request of such debtor and not to protect or subserve the interest of the widow, it was held, that she was an unsuitable person to administer.

If a party applying for letters of administration is evidently unsuitable to discharge the duties of such trust, the judge of probate is authorized and is bound to deny his petition.

THIS was an appeal from a decree of the judge of probate for Suffolk, granting letters of administration to the appellee on the estate of Jonathan P. Stearns, and refusing them to the appellant, who was the widow of the deceased.

At a hearing of the appeal, before *Wilde J.* it appeared

that the appellee was a creditor of the deceased ; that the deceased had been an inhabitant of Boston until July 1833, when he left the Commonwealth, owing large sums of money to divers persons ; and that he died in the State of New York, on February 13th, 1834, leaving estate in this Commonwealth of which administration was necessary.

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The appellee contended : 1. That the deceased had become domiciled in New York, and that the appellee, being a creditor, was interested in the estate of the deceased, and therefore as he had first presented his petition, was entitled to administration by virtue of *St.* 1817, c. 190, § 16 ; and 2. That the widow of the deceased, being manifestly an unsuitable person to be appointed to that trust, it was competent for the judge of probate to appoint a creditor of the deceased to be administrator.

On the part of the appellant it was contended, that she was of right entitled, as widow, to administer ; that no legal incapacity to execute the trust was shown ; and that no evidence of her being otherwise unsuitable, could deprive her of the right to administer, until the unsuitableness had been manifested after her appointment and in the course of discharging the trust.

The presiding judge was of opinion, upon the evidence produced, that the appellant was an unsuitable person to be appointed administratrix of the deceased, because she was under the influence of one Barker, to whom the deceased had fraudulently conveyed a large amount of property not long before his death, the deceased, at that time, being insolvent, and Barker being also a large debtor to the estate of the deceased, on four notes, two of which were given for the sum mentioned in two of the conveyances from the deceased to Barker ; that the judge of probate might properly refuse letters of administration to her, and grant them to the defendant ; and that the decree of the judge of probate ought to be confirmed.

To this opinion the counsel for the appellant excepted. If the Court should determine that such opinion was erroneous, they were to enter such decree as to them should seem right, or to order a rehearing.

Aylwin, for the appellant, as to the unsuitableness of the *March 16th*

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appellant to be appointed administratrix, cited *Winship v. Bass*, 12 Mass. R. 199 ; *Stebbins v. Lathrop*, 4 Pick. 33 ; *Andrews v. Tucker*, 7 Pick. 250 ; *Hill v. Mills*, 12 Mod. 9 ; Bacon's Abr. *Executors & Administrators, A* ; *Rex v. Raines*, 1 Ld Raym. 361 ; *Conyers v. Kitson*, 3 Haggard's Consist. R. 556.

Rand and *Fiske*, for the appellee, to the point, that a decision by a single judge of this Court, as to the unsuitableness, in point of *fact*, of the appellant, for the trust, could not be excepted to, cited *Higbee v. Bacon*, 11 Pick. 423 ; as to the unsuitableness of the appellant for the trust, *M'Gooch v. M'Gooch*, 4 Mass. R. 348 ; *Andrews v. Tucker*, 7 Pick. 250 ; and as to the extent of the authority of the judge of probate to refuse administration to a person unfit for that trust, *West v. Smith*, 3 Phillimore, 374 ; *Williams, in re*, 3 Haggard's Consist. R. 217 ; *Hinckley, in re*, 1 Haggard, 477.

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WILDE J. delivered the opinion of the Court. A hearing was had on this appeal at the sittings after the last March term, when the several questions were raised which have been now argued. The appellant claims the right to administer on the estate of her deceased husband, under the St. 1817, c. 190, § 14. This right the appellee denies on two grounds : 1. Because the appellant was and is an unsuitable person to have administration ; and 2. Because she does not come within the provision of the 14th section, her husband having had his domicile in the State of New York, at the time of his death, and in such case the judge of probate had a discretionary power, by virtue of the 16th section of the same statute, to grant administration to any one interested in the estate of the deceased.

To prove that the appellant was an unsuitable person to have administration, the appellee introduced several witnesses, and other evidence also was introduced on the part of the appellant, in relation to the same subject of inquiry, all of which evidence is reported. On considering this evidence, I was of opinion, that the appellant was not a suitable person to be appointed administratrix ; and that there was nothing erroneous in the judgment of the judge of probate in rejecting her claim, and I decided accordingly.

To this decision the appellant's counsel excepted ; and the first question to be considered is, whether, in point of fact, the appellant was an unsuitable person for this trust. The appellee's counsel insist that this is not an open question, and that no exception can be taken to the decision of a single judge, upon the evidence submitted to his judgment as to any matter of fact. By the *St.* 1828, c. 2, § 4, it is provided, that this Court, when holden by one or more of the justices thereof, shall have jurisdiction of, and may hear and determine, all appeals from any Probate Court, and may affirm or reverse the decree appealed from ; subject however to all such exceptions as are provided by law in the trials of issues in fact before said Court. By a strict construction of this statute, a party cannot except to a decision of a single judge upon mere matters of fact ; but we think it was the intention of the legislature to give to parties as large a privilege to have a decision revised in probate cases as are allowable in ordinary trials. And as a party may have a new trial when the evidence does not support the verdict, we are of opinion, that the decision of a single judge may be revised by the whole Court, if the judge fully reports the evidence, and it should appear that the decision of the judge was manifestly against evidence. It is, however, within the discretion of the judge, at the hearing, to sustain a motion for the revision of his judgment as to matters of fact, and to report the evidence or not, as he may do on motion to set aside a verdict in ordinary cases as against evidence. The Court have therefore considered the evidence in this case, and are of opinion that the decision at the hearing, that the appellant was an unsuitable person to have administration, is fully sustained by the evidence.

It appears that the appellant was very much under the influence of Barker, a debtor to the estate to a large amount, and who is charged with combining with the intestate, in his lifetime, to defraud his creditors. The appellant's application for administration was made at his request, and not to protect or subserve her own interest. This influence might and probably would be exerted to the prejudice of the creditors, had the appellant been appointed administratrix, and if they might have a remedy against her on her bond, it would increase the ex-

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penses of litigation, for the recovery of which the creditors could have no legal adequate remedy. And besides, an administrator, if so disposed, may prejudice the interests of those for whose benefit the estate is administered, without being exposed to any action. It seems to the Court, therefore, very manifest, that the appellant was an unsuitable person to have administration in this estate.

The second question is, whether the appellant is by law entitled to administration, notwithstanding she is found evidently unsuitable to discharge the duties of that trust.

This point, we think, can admit of no doubt. By the *St.* 1783, c. 24, § 19, the judges of probate, in their respective counties, are authorized and empowered to grant letters of administration to such person as to the judge may seem meet, when any executor or administrator shall become insane, or otherwise incapable of, or evidently unsuitable to discharge the trust reposed in him. It follows conclusively, we think, that if the appellant would be liable to be removed immediately after her appointment, the judge of probate might well refuse to appoint her and was bound so to do; for the appointment would have been a useless and vain act, which the law will never enforce.

This being the opinion of the Court on these two questions, it becomes unnecessary to consider the questions of domicil, and of the construction of the 16th section of the *St.* 1817, c. 190.

Decree of the judge of probate affirmed.

OTIS VINAL *versus* NATHAN BURRILL *et al.*

In assumpsit against several, who joined in a plea of *non assumpsit*, only one of them appeared when the case came on for trial. It was *held*, that this one was not legally entitled to have the others defaulted, in order that he might use them as witnesses.

If one of several defendants in assumpsit be defaulted, it seems he is not a competent witness for his co-defendants; being interested, not so much to throw on his co-defendants a portion of the demand in suit, as to reduce the plaintiff's recovery to a nominal sum.

THIS was an action of assumpsit against three defendants, Burrill, Kimball, and Valentine, formerly copartners under the firm of Burrill, Kimball & Co, to recover the balance of an account stated. The defendants pleaded jointly *non assumpsit*, and issue was joined thereon. The case was once tried before *Morton J.* and a new trial was granted. (See 16 Pick. 401.) It came on again for trial, at November term 1835, before *Wilde J.*, upon the same issue. Before the trial began, *S. D. Parker*, stated that he did not appear for Burrill or Kimball, and moved, in writing, that they should be defaulted, no one appearing for them. The motion was overruled. Burrill was in court, but he did not personally request leave to withdraw his plea, nor apply to be defaulted. He was offered by Valentine to be sworn as a witness; but the judge would not permit him to be sworn.

S. D. Parker, for the defendant Valentine.

March 9th.

C. P. Curtis, for the plaintiff.

PUTNAM J. delivered the opinion of the Court. It seems to us, under the circumstances, that Valentine had no right to interfere with Burrill and Kimball. If they did not choose to be defaulted, we think that Valentine had no right to the order or assistance of the court to have them defaulted. They stood then as parties to the record, relying upon their pleas, and it could not then appear to the court but that they might be discharged upon their pleas. The judge, we think, did right to leave them to manage the cause in their own way.

It was contended for Valentine, that if Burrill and Kimball were defaulted, and admitted as witnesses for him, their interest would have been against him, because if they testified so

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as that he would be discharged, they would be liable for the whole demand, upon their default, and could not have had any contribution against him. But we think their stronger interest would have been, in such case, to reduce the demand of the plaintiff against Valentine to nominal damages, and then no greater damages could be assessed against them upon their default.

But however that might be, we think that Valentine had no right to compel them to be defaulted. The plaintiff might unquestionably have moved for their default.

JOHN HANCOCK *versus* ZEBEDEE COOK, JUNIOR.

Where all the items of an account between the plaintiff and the defendant, as merchants, bore dates more than twenty years antecedent to the commencement of the action, it was *held*, that a small item to the debit of the defendant, dated within twenty years but at a time when the defendant had ceased to be a merchant, such item not being of a mercantile character, would not revive the whole account against the defendant.

In an action upon an account which, with the exception of an item of cash paid to the plaintiff by the defendant, was barred by the lapse of time, it was *held* that the original entry of such item by the plaintiff in his books, verified by his own oath, was not competent evidence to rebut the presumption, arising from the lapse of time, of the payment of the residue of the account. [See Revised Stat. c. 120.]

ASSUMPSIT. The writ was dated March 30th, 1835. The defendant pleaded the general issue, which was joined; and also *actio non accrevit infra sex annos*. To the second plea the plaintiff replied, that the plaintiff and the defendant were merchants, and that the causes of action arose out of their mutual dealings and accounts, as merchants, and concerned the trade of merchandise. The defendant, in his rejoinder, traversed these allegations; and issue was joined thereon.

The plaintiff filed a bill of particulars, purporting to be an account current between the parties. This account contained various charges against the defendant for flour, beef, mustard, rice, &c. sold to him during the years 1810 and 1811, amounting to the sum of \$1706.73, and also the following charge: "1815. Sept. 23. Leads of Mustards, \$16.00." The defendant was credited in the account with promissory notes and

cash given or paid during the year 1811, amounting, with a small quantity of coal, to the sum of \$1083.15. He was also credited with the following item : " 1816. Nov. 16. Cash for flour and mustard, \$29.50."

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The trial was before *Wilde J.*

The plaintiff, in order to prove the last items on the debit and credit side of the account, offered in evidence the corresponding entries in his books, verified by his own oath, that they were regular entries in his handwriting and entered at the time of their dates. This evidence was objected to by the defendant, but was admitted by the court.

Winslow Lewis, who was called as a witness by the plaintiff, testified that the defendant was a merchant, but became insolvent in the year 1811, and after having been at sea about a year, opened a private insurance office ; and that from that time to the present the defendant had been the president of an insurance company, or an insurance broker, and had not been engaged in mercantile pursuits for more than twenty-two years before the date of the writ.

The plaintiff contended, that the last items on the debit and credit side of the account were a continuation of the account of 1810 and 1811, so as to bring the whole account within twenty years ; and that the item of credit in 1816, of \$29.50, being more than sufficient to balance the item of \$16 in 1815, was such a payment towards the former account, as would be equivalent to an acknowledgment of the debt.

The judge instructed the jury, that if they thought that the two last items in the account were between the plaintiff as a merchant and the defendant as his customer, and not between merchant and merchant, then the transaction must be considered the commencement of a new account, and not a continuation of the old account, so as to bring it within twenty years ; that if the jury thought the payment of the sum of \$29.50, made by the defendant to the plaintiff in 1816, was for specific items in the account of 1810 and 1811, which were not of such a character as would fall within the exception of merchants' accounts, such payment would not be, in law, an acknowledgment of the other items of the account, so as to prevent or avoid the presumption of payment arising from the lapse of twenty years.

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The jury found, that parcel of the demands in the declaration contained, were within the exception of merchants' accounts, and as to these, the jury found that the same had been paid to the plaintiff; and as to the residue of the items constituting the plaintiff's demand, they found, that the defendant never promised.

The plaintiff moved for a new trial on account of the instructions of the court.

March 12th. *Gardiner and Hancock*, for the plaintiff.

Parsons and Stearns, for the defendant, cited *Rose v. Bryant*, 2 Campb. 321; 2 Phillipps on Evid. 137; 1 Stark. on Evid. 311; 3 Dane's Abr. 318; *Bosworth v. Colchet*, cited in Wilkinson on Limitations, 99; *Prince v. Smith*, 4 Mass. R. 455.

March 21st. SHAW C. J. delivered the opinion of the Court. Several questions were raised and argued in the present case, which we have not thought it necessary to consider, because there is one point which we are of opinion is decisive of the case. It is not denied, that if an account has been closed more than twenty years and no dealings have occurred within that time, a presumption of payment arises as well where the account is between merchants, as in the case of other accounts. It is manifest that this account, except one item on the debit side, and one on the credit side, had existed more than twenty years before the action was brought. The item on the debit side could not be considered as reviving and drawing down the account, because it was a small item, not apparently of a mercantile character, and more especially as the defendant had then ceased to be concerned in trade. The balance being then much against the defendant, this charge was not necessarily to be considered as an item in the old account, but rather the commencement of a new account, as between merchant and customer.

It then rests solely on the item of credit entered by the plaintiff himself in his books, and the books verified by his own suppletory oath, according to the usage of Massachusetts and some other of the New England States.

It is contended, that this is like the case of a security apparently barred by the statute of limitations, but having an in-

indorsement thereon, purporting to have been made within six years before the action brought, which has been considered evidence to go to the jury, to avoid the operation of the statute of limitations, and rebut the presumption of payment. But the correctness of this rule has been much questioned, and it has been construed strictly and allowed with considerable limitations. It has been considered evidence to go to the jury, to consider whether the payment was in fact made at the time which the indorsement imports. The jury are to inquire into all the circumstances, and to ascertain from them, whether the indorsement was made at the time of its date. In Lord Tenterden's act this rule was in effect repealed.*

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But without affecting that rule, we think the plaintiff's credit entry in his own book, verified by his own oath, is not competent evidence to prove a payment on account at that time, to rebut the presumption of payment arising from the lapse of twenty years. It would be carrying a rule, allowing a party to make evidence for himself, much further than it is carried, by allowing an indorsement to be received as evidence of payment. An indorsement is nominally a substitute for, and in nature of, a receipt given to a party, and put upon the security so as to discharge and extinguish it, *pro tanto*. But the admission of the evidence relied on here would be extending a rule, peculiar to this Commonwealth, of very questionable propriety, contrary to the rule and the policy of the common law, and one which courts have always been disposed to restrain within the limits prescribed to it by the usage in which it was founded. This evidence being inadmissible, a new trial must be wholly unavailing, and therefore there must be judgment on the verdict for the defendant.

* It is now repealed in Massachusetts. St. 1834, c. 182, § 3; Revised Stat. c. 120, § 17.

BENJAMIN FRENCH *et al. versus* JOHN A. LOWELL

Upon the question, whether a certain charge in an account of a general average loss, made up at New Orleans, was reasonable and customary, a deposition was offered in evidence, in which the witness, being asked to state all that he knew of a particular case tried at New Orleans, testified, that he did recollect the case, having been the secretary of the insurance company who were the defendants therein, and referred to a copy of the printed opinion of the Supreme Court of Louisiana, purporting to give the history of such case, which was annexed to the deposition, but he did not state that the law or the facts were known to him, or were truly reported. It was *held*, that such copy was inadmissible in evidence.

THIS was assumpsit, brought by the owners of the brig Pandora against a freighter, to recover the contribution due from him on general average.

March 17th. *Parsons* and *Stearns*, for the defendant, cited *Frith v. Sprague*, 14 Mass. R. 455.

C. G. Loring, for the plaintiffs.

March 21st. *SHAW* C. J. delivered the opinion of the Court. The single question in the present case is, whether the paper annexed to the deposition of one Harrod, was competent evidence to the jury, to prove any fact in issue before them. The question was, whether in an account of general average, made up at New Orleans on a vessel returning in distress, the charge of two and a half per cent upon the cargo, as a merchant's commission, was a reasonable and just charge, and one to which all those liable to general average were bound to contribute. This must depend upon the propriety and reasonableness of the charge, and this again must depend upon the usage and custom of the place. Harrod, in his deposition, in answer to an inquiry whether he knew of a particular case, tried before the council at New Orleans, and if so, to state all that he knew about it, says that he did recollect the case mentioned, having been at that period the secretary of the insurance company which was one of the parties, and he refers to the copy annexed of the printed opinion of the Supreme Court of Louisiana. The Court are of opinion, that this paper was not competent evidence, and was rightly rejected. As evidence of any fact, bearing upon the question of custom, it was incompetent, because the witness does not state that the facts

were known to him personally, or if they were, that they were truly reported in that opinion. He does not in any manner verify the statement of the facts by adopting it as his own.

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As evidence of the law of Louisiana, it was wholly irrelevant. The unwritten or customary law of a foreign country, is to be proved by the testimony of witnesses, who from their situation and circumstances may be presumed to understand it, at least that part of it which is the subject of inquiry. It would be difficult to lay down any rules *à priori*, in a matter depending so exclusively upon circumstances. In regard to a question of mercantile or maritime law of a neighbouring State, it would be reasonable to expect testimony from well known and distinguished professional men. Upon a subject of maritime law, especially of some country with which our own has little intercourse, perhaps the testimony of ship-masters and supercargoes would be considered competent. Perhaps, in a case like the present, the testimony of a president or secretary of an insurance company, as to a point of customary law, affecting mercantile rights, might be deemed competent, if given under a profession of being acquainted with it, and with the intent of stating his own knowledge of the law, with his means of knowledge. But the paper in question purports to state only the history of a particular judicial determination, and the witness does not, in terms or by implication, adopt it as a statement of his own opinion of the law, nor does he profess to know or to state the law of Louisiana upon the subject.

As the evidence of a particular judicial proceeding or decree, if such decree were in any respect relevant, it is incompetent for want of due authentication.

Judgment on the verdict.

WILLIAM STURGIS, Administrator, &c. *versus*
GEORGE W. SLACUM.

Under the act of Congress of 1792, c. 24, empowering consuls of the United States to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, and therewith "to pay the debts due from his estate which he shall have there contracted," a consul is not authorized to pay a claim, not reduced to a judgment, for damages for a wrongful act committed by the deceased.

The defendant, who was consul of the United States at Buenos Ayres, being about to visit the United States, appointed K. acting consul during his absence, but the *chargé d'affaires* of the United States at Buenos Ayres refused to recognize K. as such, and performed the duties of consul himself, until the appointment of K. was approved by the government of the United States; and in consequence of such refusal, K. was prevented from receiving the emoluments of that office for several months. The *chargé d'affaires* subsequently died intestate, and the defendant, in pursuance of the act of Congress of 1792, c. 24, took possession of his property, and, having sold it, transmitted to the plaintiff, who was appointed administrator in this State, an account of the disposition made of it, showing a balance in favor of the estate, which the defendant claimed to retain on account of the intestate's refusal to recognize K. as acting consul. It was *held*, that the defendant, by setting up such claim, ceased to act under that statute; that he had no lien on the property for the alleged tort of the intestate; and that an action at law might be maintained by the plaintiff against him, in this State, to recover such balance.

ASSUMPSIT. The parties stated a case.

In April 1825, John M. Forbes, the plaintiff's intestate, was appointed *chargé d'affaires* of the United States to the government of Buenos Ayres, and continued to reside there as such until his death in June 1831. The defendant was appointed consul of the United States at Buenos Ayres in 1824, and upon the death of the intestate, under color of his consular office, took into his possession certain personal property there, belonging to the intestate, and caused it to be sold by public auction, the intestate having no legal representative or other person authorized to take charge of such property, in Buenos Ayres. From the proceeds of the sale, the defendant paid certain debts due from the intestate at Buenos Ayres; and in August 1832, stated an account of such payments and of the proceeds of such sale, showing a balance in favor of the estate of the deceased, amounting to about 5000 dollars. The defendant alleged in the account, that he retained this balance in satisfaction of a claim against the estate of the intestate. The account was transmitted to the plaintiff.

The claim of the defendant referred to in the account arose from this cause. On October 31st, 1826, the defendant, being about to visit the United States, executed an instrument, whereby, so far as he had authority, he appointed Robert Kortright, a citizen of the United States, then residing at Buenos Ayres, his agent in all matters appertaining to the consular office and acting consul, during the defendant's absence from Buenos Ayres. Kortright accepted the appointment, and the defendant gave notice thereof to the intestate, and requested him, as *chargé d'affaires*, to recognize Kortright as such acting consul, to present him as such to the government of Buenos Ayres, and to procure his recognition by that government. But the intestate refused to comply with such request.

By this refusal, Kortright was prevented from exercising the duties of that office, and from receiving the income and emoluments thereof, for several months. The government of the United States afterwards approved of the appointment of Kortright by the defendant, as acting consul during his absence from Buenos Ayres; and the secretary of state of the United States, by a letter, dated February 16th, 1827, gave notice to the intestate of such approval, and directed him to recognize Kortright as acting consul, and to request his recognition by the government of Buenos Ayres. On the receipt of this letter, Kortright was so recognized, and entered on the duties of the office.

The intestate, from October 31st, 1826, until he received the letter from the secretary of state, assumed and performed the duties and functions of such consular office. The defendant had no evidence showing the amount of the income and emoluments of the office during that period; but he asserted, that they exceeded the balance of the account. There was no evidence that the intestate charged any fees for executing the duties of the office.

Kortright testified in his deposition, taken on the part of the defendant, that there was no agreement between him and the defendant to divide the fees of the office.

If upon these facts the plaintiff was entitled to recover in this action, judgment was to be rendered in his favor for such

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damages as the Court should order ; otherwise, judgment was to be rendered for the defendant.

C. P. Curtis, for the plaintiff.

J. Mason, contra. The defendant is not liable in an action at law to this plaintiff. The proceedings should have been in the Probate Court, or by a bill in equity. Under the act of Congress, of 1792, c. 24, the defendant became, in fact, the administrator of the intestate. As such he was independent of the administrator in this State, and not subordinate or ancillary to him. There is a total want of privity of contract between the plaintiff and the defendant, and the law will not raise an assumpsit. *Grout v. Chamberlin*, 4 Mass. R. 611 ; 1 Wms. on Executors, 595 ; *Hagthorp v. Hook*, 1 Gill & Johns. 270. The power of an administrator is limited to the jurisdiction within which administration is granted. The property in Buenos Ayres did not vest in the administrator here, and could not be interfered with by him. *Goodwin v. Jones*, 3 Mass. R. 514 ; *Stevens v. Gaylord*, 11 Mass. R. 256 *Hooker v. Olmstead*, 6 Pick. 481 ; *Harvey v. Richards*, Mason, 381.

March 21st.

WILDE J. delivered the opinion of the Court. This is an action of assumpsit, in which the plaintiff claims to recover a balance in the hands of the defendant, in the capacity of administrator of the goods and estate of John M. Forbes, lately deceased. The intestate was chargé d'affaires of the government of the United States to the government of Buenos Ayres, and died at Buenos Ayres in the year 1831. At that time the defendant was consul of the United States at that port, in the exercise of the duties of that office ; and thereupon took into his possession certain personal property of the deceased, there being, and caused the same to be sold at public auction, and out of the proceeds paid certain debts of the intestate due at Buenos Ayres, and afterwards transmitted an account thereof to the plaintiff, in which he acknowledges a balance in his hands, which he claims to retain on account of a claim he had on the estate of the intestate.

These proceedings are authorized by the act of Congress of the United States, 1792, c. 24, § 2.

The defence set up is, that the defendant was, by virtue of

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his consular office and such act of Congress, an administrator of the estate of the intestate within the government of Buenos Ayres ; that he is only liable to account in the manner prescribed by statute ; and that he is not amenable to the plaintiff within this jurisdiction, and especially not in an action at law. There can be no doubt that this defence would prevail, if the defendant had been appointed administrator in the usual manner. When there are two or more administrators appointed on the estate of a person deceased, under different governments, they are in no respect accountable to each other ; but each must administer the estate of the deceased within the jurisdiction where he was appointed, and is to account for it to the court from whom he received his appointment. And that court may order distribution according to the laws of the country where the deceased had his domicil at the time of his death ; or may order the balance to be transmitted to the administrator appointed in the country where he had his domicil. Perhaps after such an order of transmission, an action would lie in favor of the principal administrator ; for where any one is under a legal obligation to pay, the law will imply a promise. But however this may be, it is quite clear that without such order no such action could be maintained, the administrations being distinct, and there being no privity between the parties.

We are however of opinion, that the defendant is not to be regarded as an ordinary administrator, but as a receiver or agent appointed by law, and whose duties are prescribed by the statute. These duties in some respects resemble those of ordinary administrators ; but in one respect there is an important difference.

The act provides, that the consuls shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate which are contracted there ; shall sell the estate and remit the balance remaining in their hands to the treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings. If the defendant had complied with the directions of the statute, and

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had transmitted the balance in his hands to the treasury, as he was bound to do, he would have been protected by the statute. But as he elected to retain the balance, to answer his own claim, he cannot now defend himself under the statute. After setting up his own claim, he ceased to act under the statute; and unless his claim was a valid one, he was bound to pay over the balance to the plaintiff, whom he has recognized as the legal representative of the deceased; and this by the express words of the statute. Ever since transmitting his account to the plaintiff, he has ceased his proceedings under the act of Congress, and the only question now is, whether he has a right to retain the balance to answer his own claim. There is no pretence that there are any remaining debts due in Buenos Ayres, and if there were, the defendant is no longer liable for the payment. Has he then any lien on the money in his hands on account of his own claim? The general rule is, that a factor has no lien for a general balance in respect of debts which arise prior to the time at which his character of factor commenced. *Montague*, 35; *Houghton v. Matthews*, 3 Bos. & Pul. 485. And we perceive no good reason why the same rule should not be applied in the present case. But it is not necessary to decide the present case upon this principle; for I apprehend it is very clear, that no factor or agent has any general lien in respect to torts. He may retain the balance, to be sure, and suffer himself to be sued, and obtain a set-off through the medium of a cross action; but he has no lien, and no legal right to retain the money in his hands.

And there is another difficulty. We do not perceive any legal ground on which the defendant's claim can be sustained. Kortright, if any one, was the party injured by the supposed misconduct of the intestate. He would have been entitled to the fees and emoluments of the office in the absence of the defendant, and he testifies, that there was no agreement between him and the defendant to divide the fees. And if there had been such an agreement, the intestate would have been still liable only to Kortright.

But at all events, the defendant cannot retain the balance in his hands on this account. The act of Congress only authorizes him to pay the debts of the intestate contracted in Buenos

Ayres, and not to pay damages for wrongful acts, which, by the principles of the common law, are not recoverable after the death of the tortfeasor.

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It appears to us, therefore, that there is no legal ground on which the defence can be maintained ; and according to the agreement of the parties, judgment is to be rendered for the plaintiff.

WILLIAM BALLARD *versus* JOHN BALLARD.

A devise to a grandchild lapses, if the grandchild die in the lifetime of the testator, without leaving lineal descendants.

A testator devised as follows : " I give to my sons, for the term of ten years after my decease, the improvement and income of my tavern farm," &c. " Item, I give and devise to my grandchildren, the sons and daughters of my said sons, after the expiration of ten years from my decease, all those lands and tenements which I have now given the improvement of for ten years as aforesaid to my said sons, to have and to hold to them, their heirs and assigns forever." It was *held*, that this devise created a vested remainder in the grandchildren who were living at the decease of the testator, subject, however, to open and let in all those who might be born afterwards, whether born before or after the determination of the particular estate ; and that the share of a grandchild who was living at the decease of the testator, but died before the expiration of the particular estate, descended to his father as his heir.

ASSUMPSIT to recover certain rents, incomes and profits, received by the defendant. The parties stated a case.

On March 15th, 1819, John Ballard, the elder, made his will, containing the following devises :

" I give to my sons, John Ballard [the defendant] and Joseph Ballard, and my daughter, Sally Carter, for the term of ten years after my decease, the improvement and income of my tavern farm, so called, in Saugus aforesaid, bounded as set forth in the deeds of James Robertson and others to me, as will appear on record ; also, for the like term of ten years after my decease, the improvement and income of the following pieces of land : " [describing them.]

" Item, I give and devise to my grandchildren, the sons and daughters of my said sons, Joseph and John, and my daughter, Sally Carter, after the expiration of ten years from my decease, all those lands and tenements which I have now given

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the improvement of for ten years as aforesaid to my said sons, Joseph and John, and my daughter, Sally Carter, to have and to hold to them, their heirs and assigns forever."

On March 2d, 1824, the testator died.

At the time when the will was executed, the defendant had four children, Henry S., Charles A., Mary G. and Francis G. ; Joseph, the other son of the testator, had four children, Joseph H., James M., Elizabeth and the plaintiff ; and Sally Carter had five children, William B., Eliza R., Mary B., John B. and Henry. William B. Carter and Eliza R. Carter and Elizabeth Ballard, the daughter of Joseph Ballard, died, without issue, previously to the decease of the testator. John B. Carter died intestate and unmarried, after the decease of the testator, but before the expiration of the ten years. The defendant also had a daughter, Helen M., who was born subsequently to the execution of the will, but previously to the decease of the testator, and two children, John S. and Anna L., born subsequently to the decease of the testator, but before the expiration of the ten years. Joseph had likewise two children, George L. and Elizabeth, born subsequently to the decease of the testator, and before the expiration of the ten years, and an infant, born since the commencement of this action, and after the expiration of the ten years.

The question submitted to the Court was, what share of the rents and profits of the real estate received by the defendant, after the expiration of ten years from the death of the testator, the plaintiff was entitled to recover.

April 3d,
1835.

Cooke, for the plaintiff, to the point, that the devise lapsed so far as regarded William B. Carter and Eliza R. Carter and Elizabeth Ballard, who died previously to the decease of the testator, cited *Fisher v. Hill*, 7 Mass. R. 86 ; *St.* 1783, c. 24, § 8 ; and to the point, that the devise constituted a vested remainder in the grandchildren, and therefore that the share of John B. Carter descended to his father, *Dingley v. Dingley*, 5 Mass. R. 535 ; *Denny v. Allen*, 1 Pick. 147.

April 5th,
1836.

SHAW C. J. delivered the opinion of the Court. The first question which arises in this case is, whether the devise to those grandchildren, who died in the lifetime of the testator, lapsed and became wholly inoperative and void, or whether

they took any interest under the will, which could pass to their heirs ; and the Court are of opinion, that those devises lapsed and became wholly void.

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There is no doubt of the general rule, that all devises shall be deemed lapsed, if the devisee dies in the lifetime of the testator. An exception to this rule of law is created by *St. 1783, c. 24, § 8*. But two conditions are necessary to bring the case within this exception ; first, that the devisee be a child, grandchild or other relation ; and secondly, that such devisee shall die leaving lineal descendants. The first of these conditions exists in the present case, the devisees were grandchildren ; but the second fails, they left no lineal descendants. The statute is itself very clear, and has received a judicial exposition to the effect now stated. *Fisher v. Hill, 7 Mass. R. 86*. These grandchildren, not being within the exception, the general rule applies, by force of which these devises are deemed lapsed.

The other questions depend principally upon this, namely, whether this clause of the testator's will constitutes a vested remainder in the grandchildren. The Court are of opinion, that this did constitute a vested remainder. The estate is given in definite terms to the sons and daughter for the term of ten years, and the testator then gives to his grandchildren, the sons and daughters of his sons John, and Joseph, and of his daughter, Sally Carter, and to their heirs and assigns forever, all those lands, &c. Most of these grandchildren were living at the time of the death of the testator, and in regard to all those, the devise must be deemed a vested remainder, subject, however, to open and let in all those who might be afterwards born, and who should be held entitled to take under the will. *Dingley v. Dingley, 5 Mass. R. 535 ; Denny v. Allen, 1 Pick. 147*.

This remainder, then, on the decease of the testator, vested in Henry S., Charles A., Mary G., Francis G. and Helen M., children of John Ballard, William, Joseph H. and James M., children of Joseph Ballard, and Henry, Mary B. and John B., children of Sally Carter.

It is found, that after the decease of the testator and before the expiration of the ten years, there were born John S. and

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Anna L., children of John Ballard, and George L. and Elizabeth, children of Joseph Ballard, in behalf of whom the estate opens, so that according to the principle stated they are entitled to take equally with those who were living at the decease of the testator.

In regard to John B. Carter, who was living at the decease of his grandfather, but who died intestate and unmarried, the Court are of opinion, that the question is settled by the decision, that this constituted a vested remainder. Being vested, it descended by force of the statute to his father as his heir, and he is now entitled to that share.

The last and most important question is, whether those born after the expiration of the ten years, that is, after the determination of the particular estate, can come in to take a share with the other grandchildren. Such after-born grandchildren certainly come precisely within the description of those intended by the testator to share in his bounty ; and they therefore will take, unless prevented by some inflexible rule of law. The rule permitting a vested estate to be divested by subsequent and contingent events, may be attended with some inconvenience ; but it will appear fully from the authorities, that such considerations of inconvenience have not been considered sufficient, in many analogous cases, to prevent the firm establishment of the rule.

It seems to be clear, that the word "children," and "grandchildren," is a good *descriptio personarum*, to designate persons who may take by devise ; and the time within which the estate is to vest absolutely, under this will, is not so remote as to violate the rules of law prohibiting the creation of perpetuities.

The rule, that a vested estate may be defeated by a subsequent event, is well established by the law of descents ; it is contrary to no principle of law, that an estate vested by descent should open and become divested in favor of one coming subsequently in point of time, but having a prior legal right, either wholly or partially, according to circumstances. A case is put by Littleton, § 3 ; if there be father and son, and the son purchase land and die, his uncle and not his father shall have it ; conformably to the canon, that estates cannot ascend. Lord Coke, in his commentary on this passage, says

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that true it is the uncle shall be the heir, but not absolutely ; for if the father shall have issue, a son or daughter, such issue shall enter on the uncle and hold the estate. So if a man hath issue, a son and daughter, and the son purchaseth land in fee and dieth without issue, the daughter shall inherit the land ; but if the father hath afterwards issue, a son, the son shall enter into the land as heir to his brother, and if he hath issue, a daughter and no son, she shall be coparcener with her sister. This last distinction is founded on the canon, that males shall be preferred to females, but that females shall take equally. In the first of these cases, the estate which first vested in the sister will be wholly divested in favor of an after-born brother, a male, who is deemed in law worthier of blood ; and in the second case, it will open to let in the after-born sister to an equal share, and the same rule would apply *toties quoties*, if there were several sisters. *Basset v. Basset*, 3 Atk. 203. The same precise principle seems to have been held in case of a devise, or rather to be assumed and acted upon as a settled principle of law. *Cook v. Cook*, 2 Vern. 545. On a devise to the issue of J. S., who had a daughter living at the testator's death, and afterwards a son born, all the children shall take, and even grandchildren, if there were any. And in the course of the opinion, it was said by Lord *Cowper*, that although upon the death of the testator there was then only a daughter, yet upon the birth of another child the estate should open to take in the after-born son.

The cases already cited from our own books, seem to be founded on the same principle, both of which were upon the construction of devises. *Dingley v. Dingley*, 5 Mass. R. 535 ; *Denny v. Allen*, 1 Pick. 147.

On the whole, the Court are of opinion, that all the grandchildren of the testator within the description in the devise, that is, children of the two sons and the daughter named, whether born within or after the expiration of the ten years, were entitled to take equal shares in the land devised, and in regard to the after-born children, at their respective births the vested estate of the older grandchildren would be defeated *pro tanto*, and open so as to let them in for an equal share.

THOMAS P. PINGREE *versus* ANSON L. COMSTOCK
et al.

Where an assignment was made by an insolvent debtor to a creditor, in trust for the benefit of the assignee and such other creditors as should execute the same within a certain time, and the assignee accepted the trust, and a portion of the creditors became parties to the assignment, it was *held*, that those creditors who had executed the assignment, were not authorized to annul it and attach the property, before the expiration of such time, without the consent of the other creditors, although the debtor had withheld the evidences of debts due to him, and had refused to deliver to the assignee, and fraudulently wasted, a part of the property assigned; that the assignee was bound to allow all the creditors to become parties to the indenture, within the time limited; that a creditor whom the assignee had, within such time, refused to permit to execute the assignment, might enforce the execution of the trust or recover an equitable compensation; and that the assignee was bound to account, not only for the property which he had received, but for such as might have been recovered by him from the debtor by the use of due diligence.

An assignment by an insolvent debtor of "all his lands, tenements and hereditaments," was *held* sufficient to pass all his real estate, without a more particular description.

THIS was a bill in equity, setting forth, that on August 22d, 1832, Francis Wiley, one of the defendants, by his promissory note of that date, promised to pay to the plaintiff or his order the sum of \$1625, in nine months; that on May 18th, 1833, prior to the maturity of the note, an indenture was executed by and between Wiley, of the first part, Anson L. Comstock and Samuel Raymond, two of the defendants, of the second part, and the other defendants, of the third part, whereby Wiley assigned to Comstock and Raymond a large amount of real and personal estate, in trust, among other things, to apply the proceeds thereof, after paying certain expenses and the claims of Comstock and Raymond, and of Robert Stimpson and John Adden, junior, two others of the defendants, in full, to the payment of all others of the creditors of Wiley who should become parties to and execute the indenture within twenty days from its date, or within ten days after they should have seen the indenture and had an offer or permission to become parties thereto; that the plaintiff was one of the creditors of Wiley named in the indenture; that the note to the plaintiff had since become due, and was wholly unpaid; that Wiley had become insolvent and unable to pay any part thereof; that the trust and convey

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ance were accepted by Comstock and Raymond, and that by virtue of the assignment they received real and personal estate, of a value greatly exceeding all the expenses and the claims of the preferred creditors, and greatly exceeding the amount due to the plaintiff and all the creditors of Wiley who executed the indenture ; that Comstock and Raymond, on May 20th, 1833, gave notice in writing to the plaintiff, of the indenture and of their acceptance of the trust, and requested him to become party thereto ; that the plaintiff, on the 22d, demanded of them permission to execute the indenture ; but that they, combining with the other defendants, refused to execute the trust, and having caused a part of the real and personal estate to be attached by virtue of certain writs of attachment in favor of themselves and of others of the defendants, which processes were pending, and under which the property was pretended to be held, reconveyed and delivered the residue of the property, real and personal, to Wiley for his own use ; and that they refused to permit the plaintiff to become party to the indenture, or to avail himself in any manner of its provisions in his behalf. To the end, therefore, that Wiley might be enjoined from collecting any choses in action in the indenture set forth, that a receiver might be appointed, that Comstock and Raymond, and their confederates, might be enjoined from proceeding at law under the attachments of the property conveyed by the indenture, and that Comstock and Raymond might stand charged with the trusts set forth in the indenture and permit the plaintiff to become party thereto, the bill prayed that a writ might issue, &c.

The answer set forth, that the provisions declared in the indenture, were accepted by Comstock and Raymond ; that the property pretended to be conveyed to them by the indenture, as afterwards appeared, was of the value of \$ 1948 ; that the claims of the preferred creditors, all of whom had executed the indenture, amounted to \$ 1492·49 ; that the claims of the plaintiff and the other creditors of Wiley, intended to be discharged by the indenture, amounted to \$ 4266·83, so that if the whole of the real and personal estate, intended to be conveyed thereby, had come into the hands of the assignees, there would have been but a very small sum, to wit, \$ 455·51, sub-

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ject to the expenses of the execution of the trusts, to be distributed among such creditors ; that of the personal property so assigned, a part only, amounting to \$ 1520, came into the hands of the assignees ; that the indenture was wholly inoperative to pass the real estate, by reason of the uncertainty of the description thereof ; that livery of seisin thereof was never made to the assignees ; that a portion also of the personal property assigned was never delivered to them or came under their control ; that some of the defendants were informed and believed, that Wiley, without their knowledge, had paid to certain creditors of his, who were not preferred in the indenture, the whole amount of their claims, in order to induce them to execute the assignment ; that the indenture purported to convey to Comstock and Raymond all Wiley's choses in action, yet that he had, without the knowledge or consent of Comstock and Raymond and his other creditors, retained in his own hands the evidences of several large debts due to him, with intent to appropriate the same to his own use, that the defendants were advised and verily believed, that the indenture was, in consequence thereof, fraudulent and wholly ineffectual to vest a legal title to the real and personal estate thereby intended to be conveyed, in Comstock and Raymond as trustees ; that by reason thereof the indenture and the release therein contained, were utterly null and void to all intents and purposes, and the same was, with the consent of all the parties thereto, revoked and annulled, and possession of the property relinquished by Comstock and Raymond, on May 22d, 1833 ; that thereupon Comstock, Raymond, Stimpson, Adden, and Ashbel Waite, another creditor, who was also a party to the indenture, caused the stock in trade of Wiley, and other of the assigned property, to be attached, and having recovered judgments on their several writs against him, received the proceeds of such property on their executions ; and Comstock and Raymond admit, that the plaintiff was entitled to execute the indenture and that they requested him to do so, but they deny that they ever refused to permit him to execute it until after the revocation thereof and the plaintiff's knowledge of the same ; and they further deny, that they ever came into possession of more property than would have been sufficient to

pay the claims of the preferred creditors and the expenses of executing the trusts, if the same had been carried into effect.

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By the assignment, Wiley gave, granted, sold and conveyed to the trustees, "all his lands, tenements and hereditaments," but without setting forth any particular description thereof.

C. P. Curtis and Bartlett, for the plaintiff, to the point, that it was not in the power of the parties to the indenture to cancel it and attach the property assigned, for their own benefit, without the consent of the plaintiff, even if the person creating the trust assented thereto, cited *Messonier v. Kauman*, 3 Johns. Ch. R. 3; *Ward v. Lewis*, 4 Pick. 518, and cases cited; *New Eng. Bank v. Lewis*, 8 Pick. 113; *Shepherd v. M^r Evers*, 4 Johns. Ch. R. 136; to the point, that the rule adopted in this State, requiring the creditors to become parties to the trust by executing the assignment, is applicable only in the case of adverse attaching creditors, *Cumberland v. Coddington*, 3 Johns. Ch. R. 261; *New Eng. Bank v. Lewis*, 8 Pick. 113; and to the point, that the description of the real estate in the indenture was sufficient to pass all the debtor's real estate to the assignees, 4 Cruise, *tit. Deed, c. 3, § 26* to 36.

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C. G. Loring and Edw. G. Loring, for the defendants. As the trustees were to be paid in full under the assignment, there seems to be no ground for charging them with fraud in cancelling the assignment.

The real estate did not pass by the assignment, the description being too general. It does not appear, whether the land is in this State, or elsewhere. *Ingell v. Nooney*, 2 Pick. 362.

We admit that a trustee cannot affect the vested rights of the cestui que trust, without his consent; but we deny that the plaintiff was a cestui que trust. By the law of England and New York, the express assent of the creditor to the assignment is not required in order to give him a vested right; but in this State, his assent is not to be presumed; *Russell v. Woodward*, 10 Pick. 408; and therefore the cases in England and New York are inapplicable here. Before the creditor assents he can *attach*; and that is conclusive of the question. Before he assents, he has not given the consideration on which his right under the assignment is to vest; he has not complied

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with the condition of the trust. If the plaintiff, therefore, had no vested interest under the assignment, no other non-assenting creditor had ; and the assignor and the assignees held the whole legal and equitable title. Then the question is, whether a deed cannot, in equity as well as at law, be cancelled with the assent of all parties interested. Suppose an assignment to be made, and none of the creditors give their assent to it, cannot the debtor dispose of the property assigned, or must it remain liable to attachment ? If the assignment was annulled, there is an end to the plaintiff's case. The notice from the assignees gave him no vested interest, for he could still attach ; and the bill could give him none, for the trust had ceased to exist.

If the plaintiff is not a party to the contract, he cannot claim a specific performance of it. And further, if he has the power to compel the defendants to let him come into the assignment, they should have the power to compel him to come in. As there is no such mutuality between the parties, the plaintiff cannot enforce a specific performance. *Scott v. Porcher*, 3 Meriv. 652 ; *Wallwyn v. Coots*, 3 Meriv. 707.

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WILDE J. delivered the opinion of the Court. The first and principal question raised by these facts is, whether the two defendants, Comstock and Raymond, the trustees named in the indenture, are bound by the trusts they undertook to perform, so that they can be enforced against them by the plaintiff. And it is the opinion of the Court, that they are so bound. It is expressly provided as one of the trusts, that all the creditors may come in and become parties to the indenture, and it is admitted, that the plaintiff was entitled to execute the indenture, and that he was requested by the trustee so to do. It is averred in the bill and admitted in the answer, that the plaintiff applied to the trustees within the time limited, and requested them to allow him to execute the indenture, and that the trustees refused to permit him so to do ; but the trustees deny that this refusal was prior to the cancelling of the indenture, as set forth in the answer. But this fact is immaterial, unless for the reasons set forth in the answer the defendants had a right to cancel the indenture. If this right cannot be maintained, we think it very clear that the trustees were bound to perform the trusts according to the terms of the indenture, and that the

plaintiff has a right to enforce the performance of them, or to recover an equitable compensation. This right is fully maintained by the cases of *Ward v. Lewis*, 4 Pick. 518, and *New England Bank v. Lewis*, 8 Pick. 113. In both of these cases it was held, that where a trust is created for the benefit of third persons, even without their knowledge, they may, if they choose, affirm the trust and enforce its execution. And these decisions are in conformity to well established principles of equity, and the current of the authorities on the subject of trusts.

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The trustees in this case were, therefore, bound to allow all the creditors to come in and become parties to the indenture, and their refusal to allow the plaintiff so to do, was clearly a breach of trust, for which they are responsible, unless, as before remarked, they had a right to cancel the trust deed. Several grounds are relied on by which the defendants attempt to justify this act.

It has been urged, that the parties who had executed the indenture had a right to rescind it without consulting the other creditors. But in a court of equity there is no distinction between the creditors who had become parties to the indenture, and those who were entitled to become parties. All were interested in the trust, and it could not be rightfully defeated without the consent of all the creditors who were disposed to come in and claim the benefit of the trust fund. To decide otherwise, would open a door for fraudulent preferences, and other schemes and shifts, by which honest creditors might be wronged, without any remedy either at law or in equity. It is to be regretted that an insolvent debtor has the power to make any preferences. It is a power which may be grossly abused, and ought not to be extended or encouraged.

It is averred in the answer, that the assignment was null and void by reason of the fraudulent misconduct of Wiley, the insolvent debtor; that he had withheld the evidences of debts due to him, had refused to deliver to the trustees a part of the property assigned, and had fraudulently wasted the trust fund, by paying some of the creditors in full, who, by the terms of the trust, were not to be paid until after the preferred creditors. These fraudulent practices, it is contended, authorized the de

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sendants to set aside and annul the trust, and to secure their demands by attachments. But this, we think, they were not authorized to do without the consent of the other creditors interested in the trust. It was the duty of the trustees to enforce the trust by all the means in their power, instead of securing their own demands to the prejudice of the other creditors.

The trustees, therefore, must be held responsible for all damages caused by this breach of trust, and must account not only for all the property assigned which came to their hands, but for that also which might have been obtained from the fraudulent debtor. They must account also for the real estate which passed by the assignment. The objection, that there is no particular description of the lands granted, cannot be maintained. The debtor gives, grants, sells and conveys to the trustees, all his lands, tenements and hereditaments. The intention of the parties, therefore, that all the real estate should pass, is manifest, and a particular description of the lands conveyed is not required.

Upon these principles, the case is to be referred to a master, to ascertain the amount of the trust fund, including not only that part which is admitted to have been received by the trustees, but the residue so far as it might have been reduced to possession by the use of due diligence on the part of the trustees; and to ascertain also what other creditors, if any, have assented to the trust, and the amount of all the claims on the trust fund, and to state an account.

**TILMAN FARROW *et al. versus* THE COMMONWEALTH
INSURANCE COMPANY.**

By a policy of insurance on a vessel, the defendants "caused C. & L., for the owners, payable to C. & L., to be insured." It was *held*, that an action might be maintained on such policy in the names of such owners, with the consent of C. & L., it not appearing that the defendants had any claim against C. & L.

Where, at the taking of a deposition in another State, under a commission, (previously to the recent rule of court on this subject,) for the use of the plaintiffs, an attorney was present on their part, but no one was present for the defendants, it was *held*, that such deposition was nevertheless admissible in evidence; and that it was too late to take such objection, if it were valid, at the trial, it appearing that more than a year before the trial, it as known to the counsel who then conducted the defence. [Rules of Sup. Jud. Court, No. 7.]

ASSUMPSIT on a policy of insurance, dated October 10th, 1832, by which the defendants caused "Copeland & Lovering, for the owners, payable to Copeland & Lovering," to be insured the sum of \$4000, on the schooner William A. Blount, for the term of one year from October 20th, 1832.

At the trial, before Shaw C. J., it was objected, that the plaintiffs, although they were in fact the owners of the vessel, could not maintain an action on this policy in their own names. A certificate signed by Copeland & Lovering, was put into the case, setting forth, that they had delivered up the policy to the plaintiffs, to enable them to prosecute the defendants for the loss; and that the action was brought with the knowledge and consent of Copeland & Lovering, and that they had no interest therein. The objection was overruled.

The plaintiffs offered in evidence the depositions of Willis Williams and others, taken in North Carolina under a commission. The admission of these depositions was objected to, on the ground that at the time when they were taken, an attorney was present on the part of the plaintiffs, (which fact was stated in the commissioner's certificate,) but that no one was present on behalf of the defendants; but it appeared that the depositions were returned and filed in December 1834, that they soon afterwards went into the hands of the counsel who then conducted the defence, and that no objection was made on this ground until the trial, which took place in January 1836. This objection also was overruled.

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The jury returned a verdict for the plaintiffs.

If the Court should be of the opinion, that the plaintiffs could not maintain an action on this contract, or that the positions ought not to have been admitted, a new trial was to be granted.

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Fletcher, for the defendants, as to the first objection, cited *Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 82; *Parker v. Beasley*, 2 Maule & Selw. 423; *Hagedorn v. Oliverson*, 2 Maule & Selw. 485; *Cumming v. Forester*, 1 Maule & Selw. 494; as to the second objection, *St. 1797, c. 35, §§ 1, 7*.

S. Hubbard and *W. D. Sohler*, for the plaintiffs, cited to the point, that this action might be maintained by the plaintiffs, who were in fact the owners, *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; that an agent may maintain an action, in his own name, on a contract, if he is interested therein, *Underhill v. Gibson*, 2 New Hamp. R. 352; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Cranston v. Philadelphia Ins. Co.* 5 Binney, 538; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Van Staphorst v. Pearce*, 4 Mass. R. 258; that the principal may sue, *Potter v. Yale College*, 8 Connect. R. 52; *Piggott v. Thompson*, 3 Bos. & Pul. 147; *Pacific Ins. Co. v. Callett*, 4 Wendell, 75; *Higdon v. Thomas*, 1 Harr. & Gill, 153; *Marsh v. Robinson*, 4 Esp. R. 98; *Girard v. Taggart*, 5 Serg. & R. 19; *Gilmore v. Pope*, 5 Mass. R. 491; *Dugan v. United States*, 3 Wheat. 172; *Odiorne v. Maxcy*, 15 Mass. R. 44; *Arnold v. Lyman*, 17 Mass. R. 400; *Gardner v. New Bedford Ins. Co.* 17 Mass. R. 613; *Atkyns v. Amber*, 2 Esp. R. 493; *Ruan v. Gardner*, 1 Wash. C. C. R. 145; that either may sue, *Steinback v. Rhineland*, 3 Johns. Cas. 269; *Skinner v. Stocks*, 4 Barn. & Ald. 437; *Maryland Ins. Co. v. Graham*, 3 Harris. & Johns. 62; *Ward v. Wood*, 13 Mass. R. 539; Lawes on Assumpsit, 398; as to the lien of the agent, *Moody v. Webster*, 3 Pick. 424; *Cranston v. Philadelphia Ins. Co.* 5 Binney, 538; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Spring v. South Carolina Ins. Co.* 8 Wheat. 268; and to the point, that where a contract is made for the benefit of a third person, he may maintain an action on it, *Dutton v. Poole*, 2 Lev. 210; *Schemerhorn v. Vanderheyden*, 1 Johns. R. 139; *Holly v.*

Rathbone, 8 Johns. R. 148 ; *Sickles v. Sharp*, 13 Johns. R. 495 ; *Felton v. Dickinson*, 10 Mass. R. 287 ; *Hall v. Marston*, 17 Mass. R. 575 ; *Safford v. Stevens*, 2 Wendell, 158 ; *Weston v. Barker*, 12 Johns. R. 276.

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PUTNAM J. delivered the opinion of the Court. The defendants object ; 1st, that the plaintiffs cannot maintain the action in their own names ; and if they can, then 2ndly, that the depositions of Willis Williams and others, ought to have been rejected.

The stress of the argument of the defendants' counsel on the first point, was, that as the loss was by the terms of the policy to be paid to Copeland & Lovering, it necessarily restricted the action to be brought in their names ; that it was an express contract to pay Copeland & Lovering, and could not be varied without the consent of both parties ; and that the defendants have not consented or agreed to pay any other persons than Copeland & Lovering in case of loss.

Much reliance seems to be placed on the words " payable to Copeland & Lovering." But if the action were brought in the names of Copeland & Lovering, and they should recover judgment and execution, the money would be payable to them, and it would be for the use of the owners. The legal operation would in that case be just equivalent to the particular provision. And if those words were not inserted in the policy, it seems to be conceded that this action might well be maintained in the names of the owners.

It does not appear that the defendants have any claim against Copeland & Lovering. And the Court cannot presume the fact without evidence. Whether the defendants could be protected if such were the fact, is not the matter for our decision upon the facts before us in this suit.

There are obvious reasons for the introduction of the clause in question. The insurance brokers might desire to have the loss paid to them to indemnify them for any advances for premium or otherwise, which they might have against the owners ; and the insurance company might desire to have that clause, to enable them to set off any legal claim which they might have against the insurance brokers. And it would authorize them to pay the loss to the brokers without any power of attorney from

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the owners. But in the case at bar these reasons do not apply. For the brokers, Copeland & Lovering, have certified in writing, that they have delivered the policy to the plaintiffs to enable them to recover the loss ; and they say that they have no interest whatever in the suit.

The action upon this policy might have been commenced in the names of the insurance brokers, for the benefit of the owners. *Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 82 ; or it might be brought in the names of the plaintiffs, the owners. *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76. " If (says Buller J) one person makes a promise to another for the benefit of a third, that third may maintain an action upon it." 3 Bos. & Pul. 149, *in notis*. " In policies of insurance, it is a common practice to bring your action either in the name of the party by whom the contract was made, or of the party for whom the contract was made." Per Bayley J., *Sargent v. Morris*, 3 Barn. & Ald. 281. This matter seems, however, too clear to require the citation of authorities to support it.

As this cause is situated, it seems to be very clear, that the plaintiffs may maintain the action in their own names. The insurance brokers consent, and say they have nothing to do with the matter ; and the defendants do not show that they have any matter of set-off against the brokers, so that we all think that the objection upon this point cannot be sustained.

And we think, that the objection made to the admission of the depositions of Williams and others cannot prevail. The objection was, that it appeared that at the time of taking the depositions under the commission, an attorney was present on the part of the plaintiffs, and no one on the part of the defendants. Such has unquestionably been the practice, and it is not to be disallowed, until the Court shall have provided, and given notice of some rule to the contrary. It is liable to all the observations which the defendants' counsel have made. We have provided for the case in the rules which we have made, and which will be published as soon as it may be convenient, after the revised code shall come into our hands. But if the objection were tenable, we all think it should be considered as waived by the counsel for the defendants. It existed, if ever, as early as December 1834, and was known

to the counsel who then conducted the defence ; and it could not avail the defendants now, for the reason, that the counsel now engaged for the defendants, have recently had knowledge of the fact. But if the objection had been made in season, we could not have properly interfered before establishing and promulgating some rule of practice to the contrary.

Let the judgment be entered for the plaintiffs, according to the verdict.

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HENRY WINSOR *et al.* versus ISRAEL LOMBARD *et al*

Where in an action brought by two they fail to prove that they are jointly interested in the subject matter of the action, the court may allow the name of the one who is not interested therein, to be struck out.

Where a large number of barrels of mackerel branded, under the inspection laws, as No. 1 and No. 2 mackerel, were sold in the spring, it was *held*, that the description of them as such, in the bill of parcels, was not a warranty that the mackerel were free from rust, at the time of the sale, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2.

ASSUMPSIT on a warranty alleged to have been given, upon the sale of a quantity of mackerel by the defendants to the plaintiffs. Trial before *Shaw C. J.*

The bill of parcels, which was receipted and was dated May 22d, 1834, set forth, that the plaintiff Winsor bought of the defendants 199 barrels and 69 half barrels No. 1 mackerel, and 376 barrels and 196 half barrels No. 2 mackerel.

The plaintiffs introduced evidence for the purpose of showing, that they were joint purchasers ; but having failed to prove that they were jointly interested in the purchase, their counsel moved for leave to strike out the name of Peleg Churchill, one of the plaintiffs. This was allowed, although objected to by the defendants ; and the trial proceeded as if the action had been originally commenced in the name of Winsor alone. The defendants excepted to this ruling.

There was evidence tending to show, that the fish were damaged, but that the damage proceeded principally from rust ; that this is caused by the leaking out of the pickle, after the fish have been packed, inspected and branded ; and that although fish affected by rust are greatly deteriorated, and are never

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marked by the inspector as No. 1 or No. 2, yet that they are not wholly unmerchantable, but are allowed to pass inspection as No. 3. All claim for damage arising from any other cause than rust, was expressly waived by the plaintiff.

The jury were instructed, that, upon a sale by a bill of parcels, like that in this case, although the article sold was one required, by the statutes of the Commonwealth, to be inspected by a public inspector, and although the mackerel were inspected and branded No. 1 and No. 2, in pursuance of the statutes, yet as to damage arising from causes originating after they were so inspected and branded, there was an implied warranty, that the fish were in a good condition, and of a merchantable quality of mackerel of those brands respectively, at the time of the sale ; and that, therefore, if the jury were of opinion, that the fish were damaged by rust, and that this was occasioned by causes originating after the mackerel had been inspected and branded, and further, if according to the known usage of the trade, mackerel affected by rust are not considered as No. 1 or No. 2, though they may pass as No. 3, there was a breach of the implied warranty, for which the plaintiff was entitled to recover damages.

To this instruction the defendants excepted.

There was also evidence tending to show, that the fish in question were packed, inspected and branded in the autumn of 1833 ; that the casks were then well filled with pickle ; and that the sale took place in the following May.

In reference to this evidence, the jury were instructed, that if the damage arose from rust, and the cause of the rust was the want of pickle, commencing after the inspection and before the time of the sale, it was one of those things against which the defendants warranted, even although they believed that the mackerel were, at the time of the inspection, what the brands on the casks indicated, and that for aught they had known to the contrary, these brands had been truly and faithfully applied, and that no alteration or change had happened within their knowledge.

To this instruction the defendants excepted.

If either of these instructions was incorrect, the verdict, which was for the plaintiff, was to be set aside, and a new trial granted.

Washburn, for the defendants, to the point, that the amendment was inadmissible, cited *St. 1784*, c. 28, § 14 ; *Gould* on Pl. 274 ; *Howe's Practice*, 369 ; *Adams v. Leland*, 7 Pick. 62 ; *Grozier v. Atwood*, 4 Pick. 234 ; *Tuttle v. Cooper*, 10 Pick. 283 ; *Redington v. Farrar*, 5 Greenl. 379 ; and to the point, that there was no implied warranty, on the part of the defendants, that the mackerel were free from damage at the time of the sale, *Parkinson v. Lee*, 2 East, 314 ; *Emerson v. Brigham*, 10 Mass. R. 197 ; *Pearson v. Purkett*, 15 Mass. R. 264 ; 2 Kent's Comm. 374, 375.

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Dexter and *English*, for the plaintiffs, to the point, that the amendment was rightly allowed, cited *St. 1784*, c. 28, § 14 ; *Penny v. Van Cleef*, 1 Hall, (N. York,) 166 ; *Colcord v. Swan*, 7 Mass. R. 291 ; *Parsons v. Plaisted*, 13 Mass. R. 189 ; *Sherman v. Connecticut River Bridge*, 11 Mass. R. 338 ; *Leighton v. Leighton*, 1 Mass. R. 433 ; *Minor v. Mechanics Bank of Alexandria*, 1 Peters's Sup. Court R. 46 ; *Woodward v. Newhall*, 1 Pick. 500 ; *Blood v. Harrington*, 8 Pick. 552 ; *Kincaid v. Howe*, 10 Mass. R. 203 ; *Rehoboth v. Hunt*, 1 Pick. 224 ; *Marlborough v. Widmore*, 2 Strange, 890 ; *Bearecroft v. Burnham*, 3 Lev. 347 ; *Smith v. Fuller*, 1 Ld. Raym. 116 ; *Haynes v. Morgan*, 3 Mass. R. 208 ; and as to the point of implied warranty, *Hastings v. Lovering*, 2 Pick. 214 ; *Hogins v. Plympton*, 11 Pick. 99.

SHAW C. J. delivered the opinion of the Court. The Court are of opinion, that the amendment in striking out the name of one of the plaintiffs, was admissible.

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But the main question arises upon the supposed implied warranty, that the fish, at the time of the sale, were merchantable.

This was a sale of inspected fish, and there is nothing in the bill of parcels importing an express warranty. Then the question is, whether there was an implied warranty that the fish were merchantable or free from damage at the time of the sale ? It was ruled at the trial, that there was, for the purpose of receiving the evidence, so that all the questions might be brought before the Court at once ; but upon a revision of the case, the Court are all of opinion, that the action cannot be maintained.

The old rule upon this subject was well settled, that upon a

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sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a wilful misrepresentation, the maxim, *caveat emptor*, applies. Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be very difficult, it may be sufficient to say that, in this Commonwealth, the law has undergone some modification, and it is now held, that without express warranty or actual fraud, every person who sells goods of a certain denomination or description, undertakes as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale. *Hastings v. Lovering*, 2 Pick. 214 ; *Hogins v. Plympton*, 11 Pick. 97.

Indeed this rule seems to be now well settled in England. In an action for a breach of warranty, a vessel was advertised and sold as a copper-fastened vessel, but sold as she lay *with all faults*. It appeared that she was only partially copper-fastened, and not what is known to the trade as a copper-fastened vessel. It was held that, "with all faults," must be understood, all faults which a copper-fastened vessel may have. *Shepherd v. Kain*, 5 Barn. & Ald. 240.

The rule being, that upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described, this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold.

In applying this rule to the present case, the question is, what did the parties mutually understand by their contract, as it was reduced to writing. It purported to be a sale of certain barrels and half barrels of No. 1, and others of No. 2 mackerel. It is a familiar rule, that every contract is to be construed according to the subject, and with reference to those circumstances which are so notorious, that all persons conversant with the branch of trade, to which the sale relates, must be presumed to be acquainted with them. In the sale of mackerel, both parties must be presumed to be acquainted with the inspection laws, both must be understood to know the season of the year when this species of fish are caught, packed, and

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branded, and the species of damage and deterioration, to which they are liable, and that if mackerel are sold in the spring, they cannot be of an inspection more recent, than that of the preceding autumn. With these circumstances mutually understood, we have no doubt, that when these fish were sold as No. 1 and 2, the understanding of the parties was, that they were fish, packed, inspected and branded as of those numbers respectively.

It was in evidence, that fish infected with that species of damage called *rust*, a damage contracted by the leaking out of the pickle, after the fish have passed under the brand of the inspector, may be packed and inspected as No. 3, but that however good in other respects, they cannot be considered or marked as No. 1 or 2. Upon this ground it was contended by the plaintiffs, that the effect of the contract of the defendants was, that the mackerel were, at the time of the sale, fish of the quality known as No. 1 and 2; that as they could not be of those qualities, if they were rusty, it was describing them by a quality which they did not then possess; and that this was a breach of warranty. But we are all of opinion, that this would be a forced and erroneous construction of the instrument. Construed with reference to the subject matter, we think they must have understood, that the fish were inspected and branded as No. 1 and No. 2. In this respect the parties referred to the brand, and to this extent they acted upon the faith of it. Then, as there was no express warranty of their actual condition, or of the manner in which they were kept and taken care of, after the inspection, and from that time to the sale, and as there was no description embracing these particulars, it must be presumed, that both parties relied upon the faith of the inspection and brand. But if the plaintiff would hold the defendants responsible, as upon a fraud, he must show that they knew that the brand was falsely applied, or that after the inspection and before the sale, they had become damaged by rust; but no such evidence being given, and no such case suggested, the action cannot be supported.

It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by Mr. Justice *Sewall*, in *Emerson*

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v. *Brigham*, 10 Mass. R. 197. In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates ; and for damage which may happen afterwards, and against which, therefore, the brand offers no security, the vendee must secure himself by the terms of the contract ; and unless he does so, or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself.

New trial granted.

PHILIP H. FOLGER *et al.* versus GEORGE H. CHASE,
et al., Executors.

Where a note is payable on demand at a specified bank, no demand need be made at any other place, and in an action against an indorser, it will be presumed, in the absence of evidence to the contrary, that the note was at the bank, and that some officer of the bank was in attendance to receive payment.

Under the St. 1819, c. 48, providing, that corporations shall be continued bodies corporate for the term of three years after the expiration of their charters, for the purpose of settling their concerns, but not for the purpose of continuing the business for which they were established, a bank is authorized, immediately before the expiration of such term of three years, to indorse a note held by it, to trustees appointed to wind up the affairs of the bank, and vested by it with all the powers of the corporation. [See Revised Stat. 44, § 7.]

Where a note indorsed by the payee to a bank of which P. H. F. was the cashier, was again indorsed as follows: "P. H. F., Cashier," it was held, that such second indorsement was sufficient. And it seems, that in an action upon such note, by the second indorsees against the payee, if the second indorsement is not sufficiently certain, the plaintiffs may, at the trial, prefix the name of the bank to such indorsement.

An indorsement written on a slip of paper, which was attached to the back of a note by a wafer, for the purpose of writing receipts of partial payments thereon, there not being room on the back of the note, was held to be sufficient; the indorsement having been made after several of such receipts had been written on such attached paper.

THIS was assumpsit against the executors of Joseph Chase to recover the amount of three promissory notes.

The first note, dated April 11th, 1825, was made by E. Dixon, for the sum of \$867, payable to the order of the testator at the Phoenix Bank in Nantucket, on demand, with interest, and was indorsed by the testator to the President, Directors and Company of the Phoenix Bank, the testator expressly waiving all right to notice as such indorser. Upon a separate paper, annexed to this note by a wafer, was the following indorsement: "P. H. Folger, Cashier."

The second note, dated January 18th, 1830, was made by James Barker, for the sum of \$1235.92, and was payable to the order of the testator, at the Phoenix Bank, on demand, with interest. The third note, dated September 21st, 1832, was made by the testator, for the sum of \$358.31, payable to the order of Edward Chase, at the Phoenix Bank, on demand, with interest. These two notes were indorsed by the respective payees and by "P. H. Folger, Cashier," the payees expressly waiving all right to notice as indorsers.

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The trial was before *Shaw C. J.*

No evidence was given of the non-payment of the first and second notes by the makers, or of notice being given to the testator as indorser ; but the plaintiffs relied upon the special indorsement as waiving a demand and notice.

It was testified by one of the clerks of the bank, that he annexed the paper to the first note ; that the back of the note was covered with indorsements ; and that the paper was annexed in order to make room for further indorsements of payments, several of which were made before the note was indorsed over to the plaintiffs.

It further appeared, that the charter of the Phoenix Bank expired by its own limitation on October 1st, 1831 ; but the plaintiffs contended, that it was continued three years longer by virtue of *St. 1819, c. 43.*

It also appeared, that these notes were held by the Phoenix Bank until September 29th, 1834 ; that on that day it was voted by the directors, that the plaintiffs should be trustees to collect and divide the remaining effects of the corporation after the expiration of the charter, and that Folger, the cashier, should indorse all the notes held by the corporation, and deliver the same to the trustees ; and that on the same day, an indenture was executed by and between the bank and plaintiffs, by which the property of the bank was assigned to the plaintiffs, as trustees, for the purpose of collecting the debts due to the bank and settling its concerns, the trustees being vested with all the powers possessed by the corporation.

The testator was president of the bank from the time when it commenced operation until October, 1832, and he died on October 18th, 1833.

The defendants relied upon the following points of defence :

1. That a blank indorsement by the cashier, without using the name of the bank, was not a sufficient indorsement to transfer the notes.
2. That an indorsement upon a separate slip of paper, on one of the notes, was not sufficient to pass the property in the note.
3. That in regard to the notes which were indorsed by the testator, no diligence was shown to have been used to obtain payment from the makers.

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4. That the plaintiffs had no beneficial interest in the notes ; that the action was, in effect, an action by the bank, brought more than three years after the time allowed by law for winding up its concerns ; and that the bank could not do that indirectly, which it could not do directly.

5. That after the expiration of the charter, the bank had no power by the statute to negotiate notes ; and that no title passed by their indorsement.

6. That this action was not commenced within the three years allowed by the statute for winding up the concerns of the bank ; and that, on that account, this action could not be sustained.

These points of defence were overruled *pro firmâ*, and reserved for the consideration of the whole Court ; and the defendants were defaulted. If the Court should be of opinion, that the plaintiffs were not entitled to recover on either of the notes, the default was to be taken off and a nonsuit entered ; but if the plaintiffs were entitled to recover on the notes, or either of them, judgment was to be entered on the default, for one or all the notes, as the Court should order.

J. Mason and C. P. Curtis, for the plaintiffs, to the first point, cited *Northampton Bank v. Pepoon*, 11 Mass. R. 288 ; *Spear v. Ladd*, 11 Mass. R. 94 ; to the second, *Yarborough v. Bank of England*, 16 East, 12 ; as to the third, *Berkshire Bank v. Jones*, 6 Mass. R. 524 ; *Woodbridge v. Brigham*, 12 Mass. R. 403, and 13 Mass. R. 566 ; as to the fourth, *Little v. Obrien*, 9 Mass. R. 423 ; *Brigham v. Marean*, 7 Pick. 40 ; *Ogilby v. Wallace*, 2 Hall's (New York) R. 553, and cases cited ; as to the fifth, *Fleckner v. Bank of the United States*, 8 Wheaton, 339 ; and as to the constitutionality of the statute of 1819, c. 43, *Foster v. Essex Bank*, 16 Mass. R. 245 ; *Lincoln & Kennebec Bank v. Richardson*, 1 Greenl. 79.

Eddy, for the defendants, as to the third point of defence, cited *Berkshire Bank v. Jones*, 6 Mass. R. 524 ; to the point, that by the principles of the common law, upon the expiration of the charter of a corporation, all its real estate remaining unsold reverts to the original grantor and his heirs, 1 Kent's Comm. 246 ; to the point, that no interest in the notes passed to the plaintiffs, because the notes were not properly indorsed

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to them, *Barlow v. Bishop*, 1 East, 432 ; *Spear v. Ladd*, 11 Mass. R. 94.

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WILDE J. delivered the opinion of the Court. This was an action of assumpsit on three promissory notes of hand, on two of which the defendants are sued as executors of an indorser, and they object to the plaintiffs' recovery on these notes, on the ground that no demand has been made on the makers and no diligence used to collect the debts of them. These notes, however, were made payable at the Phoenix Bank, and were the property of the bank. No demand was necessary except at the bank ; and although there is no express proof that the notes were there, and some officer of the bank in attendance, at the times the notes fell due, yet this must be presumed, and it was for the defendants to show that the makers called at the place appointed, for the purpose of making payment. The testator, by his indorsements, guarantied that the makers would respectively be at the bank and pay the notes according to their tenor. *Berkshire Bank v. Jones*, 6 Mass. R. 525.

In the next place it is objected, that the bank had no authority to indorse the notes in question, as the indorsement was made after the charter of the bank had expired by its own limitation ; and that the bank had no power to sell or indorse their notes by virtue of *St. 1819, c. 43*. That statute provides, that all bodies corporate and politic, whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, should be continued bodies corporate and politic, for the term of three years from and after the day on which their powers would expire, for the purpose of prosecuting and defending all suits, and of enabling them to settle and close their concerns and divide their capital stock ; but not for the purpose of continuing their business.

This is a just and wise remedial law, and ought to be liberally expounded. By the principles of the common law, upon the civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor and his heirs ; and the debts due to and from the corporation are extinguished. The object of the statute was effectually to guard against the inequitable consequences of this rule of the common law. Now

it appears, that within three years after the expiration of the charter of the bank these notes were indorsed, and we think the bank had competent authority, by virtue of the statute, to make the indorsements. The notes not having been collected, the bank had clearly a right to sell them, or to dispose of them in any other reasonable and proper manner, so as to wind up their concerns. The bank clearly had a right to transfer the notes to the plaintiffs, and it is no concern of the defendants how the money, when collected, is to be disposed of.

As to the objection, that the indorsement is not made in the name of the corporation, we think the indorsement by the cashier in his official capacity sufficiently shows, that the indorsement was made in behalf of the bank, and if that is not sufficiently certain, the plaintiffs have the right now to prefix the name of corporation.

The last objection is, that the indorsement on one of the notes was not made on the back of the original note, and therefore amounted only to an equitable transfer. The indorsement was made on a paper attached to the back of the note by a wafer, and it had been before thus attached for the purpose of entering thereon indorsements of payments, the back of the original note having been before covered with indorsements; and several payments had been indorsed on the attached paper, before the note was transferred by indorsement to the plaintiff. This paper thus attached had become a part of the note, and no good reason can be given why an indorsement made thereon should not be held a valid and legal transfer. The objection is, that such an indorsement is not sanctioned by custom; but we think it is supported by the reasons on which the custom was originally founded. Bills of exchange and promissory notes were indorsed on the back of the bills and notes, because it was a convenient mode of making the transfer, and in order that the evidence thereof might accompany the note. Such an indorsement as this will rarely happen, and no authority to support it could reasonably be expected; but there is no authority against it.

If a person write his name on a blank paper, to be used as an indorsement of a note to be written on the other side, and it be filled up as intended, the party would be held liable as

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indorser of the note, although such indorsements are infrequent, and are not according to the customary form of making a transfer; but they have been held to be within the reason of the custom, and are supported by principle. Bayley on Bills, 92, *Violett v. Patton*, 5 Cranch, 142.

So in the present case, as there is no authority against the validity of the indorsement, we think we shall violate no principle in holding it to be a legal transfer of the note.

Judgment for the plaintiffs.

MARY LEACH *et al.* versus JAMES LEACH.

The power of rectifying written contracts on parol proof, has not been conferred on this Court.

By articles of copartnership between T. and J., T. was to furnish as stock the sum of 20,000 dollars and J. was to manage the business and with the proceeds of sales to keep up the stock at its original value, and the profits were to be divided equally between them; and at the termination of the partnership J. was to deliver up to T. the stock then remaining to the value of 20,000 dollars, losses by bad debts, decay of goods, and inevitable accidents excepted. It was *held*, that such losses should be regarded as diminishing the profits, and were not to be deducted from the capital stock so long as there was a surplus of property above 20,000 dollars.

Held also, that under these articles, the representatives of T. were not entitled, at the termination of the copartnership, to require J. to sell the capital stock and pay over to them 20,000 dollars in money, but that J. had a right to deliver to them the stock specifically.

Under the same articles, it being stipulated that T. should furnish as stock the sum of 20,000 dollars, and that the stock in trade in his store should be taken as a part of that sum at a just appraisement, and that at the termination of the partnership J. should deliver up to T. the stock then remaining, to the value of 20,000 dollars, and J. having in fact taken T's stock in trade, at cost, without an appraisement, it was *held*, that he must nevertheless, at the termination of the copartnership, deliver up stock, not of the cost, but of the value, of 20,000 dollars.

The facts, that T. appointed J. the executor of his will, and in bequeathing the partnership stock in trade to his widow and children, directed that the widow should receive her portion of the goods at the cost, were *held* not to affect the liability of J., under the articles of copartnership, to deliver up stock to the value of 20,000 dollars.

If one partner take a new lease, in his own name, of the store in which the partnership business is transacted, for a term of years extending beyond the term of the copartnership, he must account to his copartner for the profits, if any, arising from this new lease.

THIS was a bill in equity brought by the widow and children of Thomas Leach, against James Leach, his brother.

The bill alleges, that on or about the 29th of December, 1827, Thomas and James executed an indenture of copartnership, which is made a part of the bill.

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By this indenture it is, among other things, agreed, that Thomas and James shall and do become copartners under the firm of Thomas & James Leach, in the trade of importing, buying, vending and retailing English and domestic dry goods ; that the copartnership shall continue five years from the 1st of February, 1828, unless sooner determined by mutual consent or the death of James, but the death of Thomas shall not determine the copartnership, "nor shall any part of the stock in trade or other property of the firm be withdrawn on that event, but the same shall continue to be used and employed by the said James, as is provided hereinafter, for the benefit and at the risk of those who shall be entitled to the same ;" that Thomas "shall furnish and deliver in as stock the sum of \$ 20,000," and "that the stock in trade of the said Thomas now in his store, &c. shall be taken towards and as a part of said sum, at a just appraisement thereof by impartial men to be hereafter appointed by the parties ;" that "James shall manage the said business and stock in trade as to him shall seem meet, with the advice of Thomas, upon the trust nevertheless, that he shall, out of the proceeds of sales of the said stock, keep up and continue the said stock at its quality and value as the same shall be received by him, and shall by and out of the profits which shall be received from the said trade, pay all rents and taxes which shall be payable on account of said firm and trade, and shall defray all the usual and necessary expenses of the said trade, and shall pay to the said Thomas one full and just half part of all the residue of the profits of the said trade, and shall retain for his own use and benefit the remainder of all said profits as and for a full and entire recompense for his care, trouble and labor in the management of the said trade ;" that James "shall not, during said term, in any manner trade or deal in his own name or for his private account, but only in the name of the said firm and for the trusts aforesaid ;" and that at the termination of the copartnership, James shall "take a full and just account in writing, of the said stock then remaining in the said trade and of the expenses

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and profits thereof, and deliver the same to the said Thomas," and shall "deliver up to Thomas, his executors, administrators or assigns, for his or their use or benefit, all the stock then remaining, to the value of twenty thousand dollars, losses by bad debts, decay of goods, and inevitable accidents excepted."

The bill further states, that on or about the same 29th of December, 1827, Thomas made his will, in which, after giving to his wife certain real and personal estate, he declares it to be his intention to give her a full third part in value, of his whole estate, and "to make up the said third part in value," he gives to his wife so much of his stock in trade as shall, in addition to the above expressed devise and bequest, be sufficient for that purpose ; and he says, "it is my will that the said stock shall be estimated at the cost thereof, and that no part nor interest in my said stock in trade hereby given to my said dear wife shall be withdrawn by her before the termination of my agreement of partnership with my brother James Leach, but that the same shall be suffered to remain and be employed, as by said agreement is provided, for the benefit and at the risk of my said dear wife ;" he gives his brother James the residue and remainder of all his estate, real and personal, in trust for the testator's six children, "that is to say, I direct my said trustee to sell, invest and manage the said residue and remainder as shall in his discretion seem most advantageous." "I direct my said trustee to pay or transfer to my daughter Mary Ann one full sixth part of the said residue at her age of twenty-one years or upon the day of her marriage, whichever shall first happen ;" and the testator appoints his widow and James his executors.

The bill further alleges, that about the last day of January, 1828, Thomas Leach died ; that James continued until the 1st of February, 1833, to carry on the business at the store in Court street ; that it was then the duty of James to sell and dispose of the goods and other stock then remaining, in such manner as should be most advantageous for all persons interested therein, and settle the partnership concerns, and distribute the proceeds of the stock, and the profits of the business, among the parties respectively entitled thereto ; but the bill charges, that he refuses so to do, and that he insists upon dis-

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tributing the goods remaining in the store, to the amount of \$ 20,000, estimated at their cost but not salable for that sum, specifically among the plaintiffs, as and for a return of the capital advanced by Thomas Leach ; and that having obtained, during the copartnership, a new lease of the store for a term of years extending beyond the term of the copartnership, in his own name, he is carrying on the business for his own sole account, availing himself of the good will of the store for his private benefit. And whereas the defendant pretends that he is not responsible for any proportion of bad debts and other losses, which have arisen in the course of the business, but that the same are wholly to be taken out of that portion of the capital and profits which belong to the plaintiffs, the plaintiffs charge that the defendant is not at liberty to throw upon them any of the losses, but that he is bound to bear his proportion thereof by charging them against the profits of the firm or otherwise. And the plaintiffs further charge, that if the true construction of the indenture, in respect to the bad debts and the specific division of the goods, be not as they have alleged, then it was erroneously drafted and by mistake of the scrivener, and was executed by the parties under a mutual misapprehension.

The bill prays that the defendant be required to answer and to render an account, and for the appointment of a receiver, and for further relief.

The defendant, in his answer, alleges that Thomas Leach, by his will, directed that the stock to be employed in trade, should be estimated at the cost, and in consequence of this and of the frequent declarations of Thomas to the same effect, the stock in the store of Thomas at the time when the copartnership commenced, amounting to about \$ 15,000, was not appraised ; that he has a right and is under obligation to distribute specifically among the widow of Thomas and such of his children as may have come of age, their proportions of the goods of the firm, to wit, to the amount of \$ 20,000, valuing the same at cost, remaining unsold at the expiration of the copartnership ; that the partnership goods in the store amount to about \$ 24,000 ; that as to the lease of the store, which the complainants allege he has procured for his own use, for a

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term of five years from the expiration of the former term, he is advised that he had a good right so to do ; that he has occupied the store for about three years last past, under this lease ; that the probability that he would succeed to the good will of the store, was held out to him as an inducement to enter into the copartnership ; and that it was always understood by him, and, as he believes, by Thomas, that he was not to bear any part of the losses that might arise from bad debts or otherwise, and that he was to surrender a stock at the expiration of the copartnership equal in amount and quality to that received at the commencement, bad debts, decay of goods and unavoidable accidents excepted ; and that the articles of copartnership were not erroneously drawn.

The plaintiffs filed a general replication.

March 30th. *F. Dexter and W. H. Gardiner*, for the plaintiffs, cited to the point, that the defendant was bound to sell the merchandise and pay off the capital in money, *Sigourney v. Munn*, 7 Connect. R. 11 ; *Featherstonhaugh v. Fenwick*, 17 Ves. 309 ; *Cook v. Collingridge*, 1 Jacob, 607 ; that he must account for the profits of the new lease, *Featherstonhaugh v. Fenwick*, 17 Ves. 309 ; *Alder v. Fouracre*, 3 Swanst. 489.

Sohier and B. Sumner, for the defendant.

April 5th. *WILDE J.* delivered the opinion of the Court.

Among other stipulations in the indenture between Thomas and James Leach, it was agreed, that at the expiration of the partnership James should take a full and just account in writing of the stock then remaining in the trade, and of the expenses and profits thereof, and should then deliver up to Thomas, his executors, administrators or assigns, for his or their use and benefit, all the stock then remaining, to the value of twenty thousand dollars, losses by bad debts, decay of goods, and inevitable accidents excepted.

On this stipulation several questions have been raised, and at a former hearing the plaintiffs offered evidence explanatory of the true meaning of the parties, and to show that the written agreement was erroneously drafted by mistake of the attorney who drew the same, if its true construction be such as is contended for by the defendant's counsel. This evidence was deemed inadmissible and was rejected. It has been argued by

the plaintiffs' counsel, that it ought to have been admitted, on the ground that a party is entitled in a court of equity, to relief on account of an omission or plain mistake in a contract in writing, and that upon clear and satisfactory proof the court will rectify or reform the contract.

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The power of a court of equity to reform or rectify contracts, however important and useful it may be in the administration of justice, is clearly not within the limited jurisdiction of this Court. The question was very ably argued, and fully considered, in the case of *Dwight v. Pomeroy & al.* 17 Mass. R. 303, which is a decisive authority against the admission of parol evidence in the present case.

The plaintiffs' counsel have attempted to distinguish the two cases, but we can perceive no distinction as to the rules of evidence, and the right of the Court to interfere by rectifying a written contract. It has been said that the Court has unlimited chancery jurisdiction in regard to all disputes between co-partners. This is true, but so also had the Court unlimited chancery jurisdiction as to all trusts arising under deeds, which was the subject matter of dispute in *Dwight v. Pomeroy & al.* The power of rectifying written contracts on parol proof, belongs to a distinct head of chancery jurisdiction, which the legislature has not confided to this Court. So far, therefore, as the matters in dispute between the parties relate to the terms of the partnership, they must be decided according to the construction to be given to the written agreement.

The first question in this respect is, upon which of the parties the losses by bad debts are to fall ; whether they are to be deducted from the profits, or the capital stock belonging to the plaintiffs. The defendant's counsel contend that the agreement is express, that "all losses by bad debts, decay of goods, and inevitable accidents" are to be deducted from the capital stock of \$20,000. This is undoubtedly the literal construction of one of the articles of partnership ; but in order to ascertain the intention of the parties, the whole agreement must be taken into consideration, and such a construction must be adopted, if it may be, as will render the various parts consistent with each other. Now, by another of the articles of partnership it was agreed, that all rents, taxes and expenses should

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be paid out of the profits of the trade ; that the defendant should keep up, and continue the stock at its quality and value as the same was received by him ; and should pay to the testator one full and just half part of all the residue of the profits of the said trade, after deducting expenses, &c. and should retain for his own use and benefit the remainder of all said profits, as and for a full and entire recompense for his care, trouble and labor in the management of the said trade. By this article of the agreement the plaintiffs are clearly entitled to one half of the profits in addition to the capital stock, which was to be kept up to its original value. Both parties were to share the profits equally, and no profits were to be shared by either party unless the capital stock could be kept up to its original value with a surplus remaining ; for unless there was a surplus, there could be no profits.

Now it is clear, that this stipulation is altogether inconsistent with the defendant's construction of the other stipulation in regard to bad debts. For if the plaintiffs are to bear the whole loss of the bad debts, the profits will not be equally divided. The profits and the surplus over \$20,000 are identical, and in this surplus the parties are to share equally. If there were no surplus except the bad debts, there would be no profits. The defendant claims one half of the nominal profits ; but if he is entitled to half of the nominal profits, he must receive his pay in nominal debts, in the same proportion that the plaintiffs are to receive their share. The actual profits are to be now divided equally, and if any of the debts now supposed to be bad should be available, a further division of profits may be made. The clause in the agreement relied on by the defendant, may be construed consistently with this construction of the other parts of the agreement ; and it ought, we think, to be so construed. The defendant stipulated, at the determination of the partnership to deliver up to the testator, his executors, administrators or assigns, all the stock then remaining, to the value of \$20,000, " losses by bad debts, decay of goods, and inevitable accidents excepted." This exception would have applied if the capital stock had been reduced below \$20,000, but as the capital stock was to be kept up to that value before any profits were to be divided, and as it has been

so kept up, and a large surplus remains, the exception as to bad debts, decay of goods, and inevitable accidents, has no application to the present rights of the parties ; for the capital stock has not been reduced. We are of opinion, therefore, that the plaintiffs are entitled to receive the capital stock to the amount of \$ 20,000, and their share of the profits ; and it remains to be considered in what manner distribution is to be made.

The plaintiffs claim to be entitled to have the whole partnership effects sold, and that a distribution of the proceeds should be made in money. This claim would be well founded if there had been no stipulation between the parties as to the mode and manner of winding up the concern. But the partners had an unrestricted right to stipulate, by the articles of partnership, in what manner the partnership effects should be disposed of, at the dissolution of the partnership ; and whatever course was agreed upon, it must form the basis of the settlement between the representatives of the deceased and surviving partner. Gow, 430.

In the case of *Cook v. Collingridge*, 1 Jacob, 607, cited by the plaintiffs' counsel, where articles of partnership provided that upon its expiration, the stock in trade should be divided, received and taken by the partners according to their interests, it was held, that as the articles could not be carried into execution literally, the settlement should be made by a sale and division of the whole. This decision is not opposed to the general principle, that stipulations of this kind are valid and binding, but is founded on the difficulty and impracticability, from the situation of the property, of executing the agreement of the parties in that case. The validity of such stipulations, if the execution of them be practicable, cannot be questioned, and there is no difficulty in executing the agreement of the partners in the present case.

By the articles of partnership the defendant was bound to deliver to the testator, his executors, administrators, or assigns, at the expiration of the partnership, all the stock remaining, to the amount of \$ 20,000 ; but this obligation was modified by the testator's will, under which the defendant had a right to retain the greatest part of the property in trust, to be managed

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by him, according to his discretion, for the best advantage of the minor children. But he was bound to deliver over to the widow and to Mary Ann Leach their portions of the stock, at the expiration of the partnership, and the residue to hold in trust under the will. The defendant, however, contends that the plaintiffs are bound to take the goods at costs, and not on a just valuation, because the stock was originally estimated at costs, and was not appraised. But the contract is express, that the goods to be delivered over are to be of the value of \$20,000. If the stock was received at costs, the presumption is that it was of equal value, but it would not follow that the stock remaining unsold at the end of five years would be in value equal to the costs.

The widow, by the will, is to receive her portion of the goods at costs, but this provision in the will does not affect the defendant's liability upon the contract, but directs only the apportionment between the widow and the children. The defendant is bound to set apart goods to the value of \$20,000, to be divided between them as directed by the will, and it is immaterial to him how the apportionment between them is to be made.

One other question only remains to be considered. It is charged in the bill, and admitted by the answer, that during the continuance of the partnership the defendant took a new lease, in his own name, of the store in which the partnership business was transacted, for a term of years extending beyond the term of the copartnership, and the plaintiffs claim that the defendant shall be held to account for the profits, if any there be, arising from this new lease. This claim, we think, is well founded. The renewed lease formed a part of the partnership property at the time of the dissolution of the partnership. It was so decided, and we think on sound principles, in the case of *Featherstonhaugh v. Fenwick*, 17 Ves. 298. It is there said, that one partner cannot treat privately, and behind the backs of his copartners, for the lease of the premises where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership. If then the new lease was of any value, beyond the amount of the rent reserved, we think the defendant is bound to account therefor.

Referred to a master.

PHOENIX BANK *versus* JOHN BUMSTEAD.

The plaintiffs, who were the holders of a promissory note of a corporation, in which the stockholders were personally liable for its debts, agreed with the defendant, who had purchased up most of such debts, that they would accept thirty-five per cent of the amount due on the note, and deliver the note to him, but that, in case one F. should be considered chargeable with the amount of such note, by reason of his being or having been a stockholder, whatever might be obtained from F. should belong to them, the defendant not assuming to make any attempt for the recovery thereof from F. except at their request and expense, and being authorized to discharge any other member of the corporation, however it might affect the claim reserved in favor of the plaintiffs against F. At the time when this agreement was made, an action was pending, in which the liability of F. was in controversy; but before it was decided, the defendant, in consideration of a certain sum paid by F., without the knowledge of the plaintiffs, made a compromise with him of all claims against him on account of the debts of the corporation, including the note in question, and discharged him from all his supposed liability therefor, but without discharging the other members of the corporation. The plaintiffs afterwards, and when the note was barred by the statute of limitations, directed the defendant to take all necessary measures for the collection from F. of the balance due on the note, and authorized him to draw on them for the expenses thereof. It was *held*, that as the defendant had authority to discharge the other corporators, the effect of which would be to exonerate F. from liability, except perhaps for his share of the debts in proportion to the amount of his stock, if the defendant could make a compromise with F. equally favorable to the plaintiffs without discharging the other corporators, he had authority to do so and the plaintiffs were not entitled to recover of the defendant the whole sum due on the note.

Held also, that although it had never been determined that F. was legally liable, yet as he had made a voluntary payment to the defendant on account of this note, the plaintiffs were entitled to the benefit of it.

THIS was assumpsit to recover a balance alleged by the plaintiffs to be due to them from the defendant, upon two promissory notes, one, dated December 26th, 1826, for \$731.60, and the other, dated January 31st, 1827, for \$984.96, payable to and indorsed by the treasurer of the Boston Glass Manufactory.

The parties stated a case.

Prior to July 24th, 1830, the defendant had become one of the assignees of the property of the Boston Glass Manufactory, and was engaged in purchasing up the debts due from that corporation, for which provision was made in the assignment. On that day the defendant, having disclosed to the plaintiffs, who were the holders of four notes indorsed by the treasurer of the Boston Glass Manufactory, including the notes in suit, the situation of the assigned property, entered into an agree-

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ment with them in respect to such notes, by which the plaintiffs "consented to accept said Bumstead's offer of $\frac{85}{100}$ of said debt, and to deliver said notes to him, with the understanding and agreement on the part of said Bumstead, that in case Ebenezer Francis, Esq. shall be considered chargeable with the amount of said notes or either of them, by reason of his being or having been a member of said glass manufactory, all and whatever sum or sums of money, which shall or may be obtained from said Francis, is and are to belong to and be taken for the use of said bank, and that any and all other benefits and advantages, rights, claims and demands which result from or arise under said notes or either of them, are to be enjoyed by said Bumstead. Said Bumstead does not assume to do any act, or make any attempt for or towards the recovery of said notes or either of them from said Francis, except at the request and expense of said bank." "It is understood, that the foregoing agreement empowers the said Bumstead to discharge any and all other corporators, however it may affect the claim reserved in favor of the Phoenix Bank against said Francis."

At the time when the parties entered into this agreement, there was an action pending, in which Francis claimed damages from the sheriff of Suffolk county, for levying an execution issued in favor of the Washington Bank against the Boston Glass Manufactory, upon the property of Francis, as a stockholder liable for the debts of the corporation. This action was defended by the present defendant in pursuance of an agreement made by him with the Washington Bank, who had assigned to him the judgment against the Boston Glass Manufactory, it being agreed, that he should account to that bank for a portion of any moneys received by virtue thereof. A verdict was returned in this action against Francis, but no judgment was rendered thereon, a motion having been made for a new trial.

On June 4th, 1833, the motion for a new trial being then pending, and there being notes of the Boston Glass Manufactory outstanding and due to the amount of \$110,053.95, for the payment of which the defendant, who had previously purchased the most of them, claimed to hold Francis liable, the defendant made a compromise with Francis of all claims against

him under such notes, giving a schedule of them including the two notes now in suit, and received of Francis the sum of \$18,000 therefor. The defendant expended the sum of \$2,500 in his proceedings to recover the claim against Francis. In pursuance of this compromise the defendant executed an instrument, whereby he covenanted that he would never make or suffer to be made any claim against Francis, nor suffer any action to be prosecuted against him, for or on account of the notes, judgments and claims against the Boston Glass Manufactory, which were assigned to the defendant, and that he would indemnify Francis against all claims which might be made by any member of that corporation for contribution, and against all other claims which could in any wise be made against him by reason of his being or having been a member of that corporation. The instrument further set forth, that the defendant had deposited the notes, assignments of the judgments, &c. with three persons as trustees, upon the trust, that they would permit him to institute suits thereupon, or otherwise to use the same so far as might be necessary for the enforcing of such claims; and that the defendant thereby constituted such trustees to be so far his attorneys irrevocable, in such suits or claims, as to prevent the same from being prejudicial to Francis, with full power to release him from any claim, attachment or arrest that might be made by virtue thereof, it being understood, however, that any liability which Francis might be supposed to be under to any corporator, against whom such suit or claim might be brought or made, by way of contribution, should not be taken to be such prejudice or injury to Francis as should prevent the bringing of the same, or justify the trustees in discharging the same, as against such other corporator.

The plaintiffs having learned from rumor, that a compromise had been made between the defendant and Francis, applied to the defendant on July 22d, 1833, for information on that subject; but no information was received from him in relation thereto, he being, as he alleged, under the impression, that their counsel had been informed of the facts, and not supposing himself liable to the plaintiffs on account of the arrangement.

On November 25th, 1833, the plaintiffs passed a vote, au-

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thorizing and directing the defendant to take all necessary and proper measures, at their expense, for the collection from Francis, of the balance due to them from the Boston Glass Manufactory, on certain notes delivered to the defendant, in conformity with the agreement made with him, and to draw on their cashier for the expenses incurred by him by virtue of such vote. Afterwards the plaintiffs obtained certain knowledge of the compromise between the defendant and Francis, and demanded of the defendant the balance due upon the notes ; and upon his refusal to pay the same, this action was brought.

If the Court should be of opinion, that the plaintiffs were entitled to recover in this action any sum of money of the defendant, upon these facts, he was to be defaulted, and judgment was to be rendered for such sum ; otherwise the plaintiffs were to become nonsuit.

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Sohier, for the plaintiffs, cited *Amory v. Hamilton*, 17 Mass. R. 103 ; *Hemenway v. Hemenway*, 5 Pick. 389 ; *Deland v. Amesbury W. & C. Manufacturing Co.* 7 Pick. 244 ; *Thompson v. Stewart*, 3 Connect. R. 171 ; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424.

J. Mason and C. G. Loring, for the defendant.

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WILDE J. delivered the opinion of the Court. Upon the facts stated in this case, we think the plaintiffs are clearly entitled to recover the proportion of the sum of \$ 18,000, which was paid on account of the two notes on which their present claim is founded, after deducting from the whole sum the defendant's expenses in his proceedings to recover the amount of such claims.

It is objected, that the question as to Francis's legal liability to pay those claims has never been determined ; that it does not now appear that he was so liable ; that by the terms of the agreement the defendant was not bound to make any attempt to recover such notes from Francis, except at the request and expense of the plaintiffs ; and that he was not requested by the plaintiffs to commence a suit for the recovery of such notes, at their costs and charges, until the demands were barred by the statute of limitation.

These objections have not been pressed by the defendant?

counsel, and are of no avail. The essential part of the agreement between the parties is, that all moneys obtained from Francis on these notes shall belong to and be taken for the use of the plaintiffs. It is immaterial whether Francis was or was not liable, since the money has been fairly obtained from him, and cannot be reclaimed. It is not denied, that the payment was voluntarily made, with a full knowledge of all the facts relating to his supposed liability ; and there is, therefore, no legal or equitable ground on which the defendant can resist the plaintiffs' claim, for the money expressly received for their use under the agreement.

The only remaining question to be considered is, whether the defendant is liable for any further sum than that actually received. The plaintiffs claim the whole balance due on the notes, because the defendant had no right to make any composition as to these notes, without their consent ; and by giving to Francis a discharge from his supposed liability, or a bond of indemnity equivalent to a discharge, the defendant has rendered himself liable to pay the full amount due on the notes.

This claim appears plausible, but after carefully considering the terms of the agreement, in connexion with the circumstances of the case, we are of opinion, that it cannot be sustained. It is evident, that at the time when the notes in question were transferred to the defendant, and the agreement was made respecting them, the claim upon Francis was considered by the parties as of doubtful validity ; otherwise these and other notes against the manufactory would not have been sold at so great a discount. The defendant, however, was not required to do any act, or make any attempt to enforce the claim against Francis, except at the request and expense of the plaintiffs ; and for a long time after, no such request was made. But it was expected that something might be obtained by the defendant of Francis without suit.

From these and other facts and circumstances, it seems reasonable to infer, that there was an understanding between the parties, that the defendant should deal with the notes transferred to him by the plaintiffs in the same manner as he should deal with his other claims on Francis, in which his interest and theirs were in all respects similar. These claims were large,

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and he had strong motives to make the most of them. He must be presumed to have acted with full consideration, and upon the best advice, and with the belief that the compromise would be beneficial both to himself and to the plaintiffs. There is no reason for believing that the compromise was not thus beneficial. It does not appear that Francis was liable ; and under the circumstances of the case we think the plaintiffs are not entitled to recover damages of the defendant for discharging Francis from his supposed liability, without showing that he was in fact and by law liable. Without showing this they would be entitled to nominal damages only, although the defendant had by mistake exceeded his authority.

It does not, however, appear that the defendant has exceeded his authority. He had authority under the agreement, to discharge all the corporators, except Francis, however it might affect the plaintiffs' reserved claim against him. The effect of such a discharge would be to exonerate Francis from all liability, except perhaps for his share of the debt, according to the amount of his stock, and the proportion it bore to the whole stock of the company, whether any or all the corporators were insolvent or solvent. Now, although the defendant has not in fact discharged the other corporators, yet if he could make a compromise equally favorable to the plaintiffs, without making such a discharge, we think he had authority so to do, and that the plaintiffs are in no manner prejudiced thereby.

On these considerations judgment must be rendered for the plaintiffs ; not, however, for the balance due on the notes, but for their share of the money actually received of Francis by the defendant, deducting their share of the expenses.

Judgment for the plaintiffs.

SILAS PEIRCE *versus* THE OCEAN INSURANCE COMPANY.

A vessel insured at Boston, while on a voyage to Mobile, struck on Carysford reef, and was injured to the amount of more than half her value, but was got off and arrived in safety at Mobile. While she was lying at a wharf in that port, a survey was held upon her, and the surveyors having recommended a sale, she was sold by the master, who was also a part owner and one of the insured, without consulting the insurers or the agent of the owners at Boston. It was *held*, that the master, as such, was not justified, under these circumstances, in selling the vessel. In the same case it appeared, that when the facts became known in Boston, the agent before mentioned, to whom, by the policy, the loss was made payable, called on the insurers with the protest and the other usual documents to prove a loss, and a statement setting forth a claim for a salvage loss on the vessel incurred in consequence of her getting on the reef on her voyage to Mobile, at which place she was surveyed, condemned and sold for the good of all concerned, the insurers being charged therein with the value of the vessel and credited with the proceeds of the sale, and demanded payment of a total loss; and that an action was subsequently brought by such agent against the insurers, claiming as for a total loss, the declaration averring the interest to be in the master and the other part owners *jointly*. It was *held*, that under such declaration no distinction could be made between the rights of the other part owners and those of the master, who could not set up his own unauthorized act as the foundation for a claim for a total loss, and who was also incapacitated from making an effectual abandonment, by the sale, which passed his interest in the vessel as a part owner; that (*semble*) the other part owners, by joining in the claim against the defendants, in which they set forth the sale and credit the insurers with the proceeds, ratified the sale, and so disqualified themselves to abandon; that there was not in fact an abandonment, there being no relinquishment of the vessel or of any interest therein; that if it could be considered that an abandonment was made by implication, it was made on the ground that the vessel had been condemned and sold, which did not warrant the owners in abandoning, and they could not avail themselves of the ground that the vessel was injured, by striking on the reef, to the amount of more than half her value; and, consequently, that there was not such an abandonment, as would relate back to the time when the loss occurred, so as to constitute the master the agent of the insurers, thereby throwing on them the responsibility for such unauthorized sale, and thus render them liable as for a total loss.

ASSUMPSIT on a policy of insurance, dated August 30th, 1833, by which the defendants insured the plaintiff, for whom it concerned, the sum of \$5000, on the brig Cambridge, valued at that sum, including the premium, for one year, at sea and in port. By the terms of the policy, the sum insured was payable to the plaintiff in case of loss.

The declaration averred, that Waldo Peirce, Robert Treat and Andrew Tyler, the master, "were interested in said vessel to the amount of all the sums insured or by them caused to

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be insured thereon, and that said insurance was effected by this plaintiff by their order and on their behalf ;” and the plaintiff claimed as for a total loss of the vessel by the perils of the sea, while prosecuting a voyage from New York to Mobile.

The trial was before *Putnam J.* The plaintiff offered evidence to show, that the vessel, while prosecuting the voyage, struck on Carysford reef, and remained there in great peril, for twenty-eight hours, leaking badly ; that in order to relieve her a part of the cargo was thrown overboard, and a part discharged into wreckers, which came to her assistance ; that the vessel was then got off and carried into Key West, where she arrived on February 3d, 1834 ; that a survey was had on her at Key West, and the surveyors directed that she should proceed on her voyage to Mobile, and be there further examined ; that the vessel arrived at Mobile, on the 2d of March, and on the 15th of the same month had discharged her cargo and was lying in safety at a wharf in Mobile ; that surveys were held upon her, and estimates were made of the expenses of repairs considered necessary ; that the surveyors recommended a sale of the vessel, and she was accordingly sold by the master, by auction, on April 2d, 1834 ; that the purchaser took possession immediately on the sale, and repaired her and sent her to sea.

In order to prove an abandonment, the plaintiff proposed to offer evidence showing, that about the 13th of May, when the facts became known in Boston, and the papers had arrived, the plaintiff, who resided in Boston, called at the office of the defendants, with the protest, and the other usual documents, to prove the loss, and a statement of the loss made up by an insurance broker, and demanded payment as for a total loss. The statement thus presented purported to be the statement of a claim for salvage loss on the vessel, occasioned by her getting on the Florida reef, on her voyage from New York to Mobile, at which latter place she was surveyed, condemned and sold for the good of all concerned ; it then charged the value of the vessel, and credited, by way of salvage, the proceeds of the sale, first deducting all charges. The judge ruled, that this was not sufficient to prove an abandonment, but that an abandonment must be made in writing.

The defendants then offered evidence to show, that the vessel was actually repaired for a much less sum than that stated in the estimates ; and the plaintiff was about to introduce evidence to prove, that she was imperfectly repaired, that she could not have been made as good a vessel as she was before the accident occurred, without repairs exceeding one half of her value, after deducting one third new for old, and that in her situation a sale was for the interest of all concerned, when, on motion of the defendants, the judge ruled, that the master had no authority to sell under the circumstances, without notice to the owners and insurers, that the sale was therefore unjustifiable, and that, as there was no abandonment, the plaintiff was not entitled to recover as for a total loss, although the expenses for repairs, estimated as for a partial loss, would have exceeded half of the value of the vessel, and although a sale might have been advisable for all concerned.

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The case was thereupon taken from the jury, in order that it might be submitted to the whole Court to determine upon the correctness of these rulings.

If the Court should be of opinion, upon the facts stated and the evidence offered by the plaintiff to prove the necessity or expediency of a sale, that a sale without notice to the owners and insurers, might be justifiable, or that the evidence offered by the plaintiff was admissible and competent to prove an abandonment and so enable the plaintiff to recover for a constructive total loss, a new trial was to be granted. If the Court should be of opinion, that the sale was not justifiable, so as to constitute an actual total loss, and that the evidence offered by the plaintiff to prove an abandonment, was inadmissible or incompetent for the purpose of constituting a constructive total loss, then the case was to be sent to the jury, to ascertain the facts as to the place where the vessel should have been repaired, and such other facts as might be necessary to be found by a jury, in order to enable an assessor to make up the partial loss.

C. G. Loring and F. C. Loring, for the plaintiff. The present case is distinguished from those in which it has been held that sales of the vessel by the master were unauthorized, by the circumstance, that here was a constructive total loss previously to the sale. The plaintiff does not claim a total

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loss by reason of the sale, and the liability of the defendants was not affected thereby. The authority of the master should in such case be more extensive. • It may be contended, that the master should have notified the loss to the owners, in order that they might elect either to repair or to sell; but upon the occurrence of the loss, the master became the agent of the defendants, the abandonment relating back to the time of the loss, and the defendants are of course responsible for his acts. If the sale was unjustifiable, we say the master acted as the agent of the defendants in selling. *Col. Ins. Co. v. Ashby*, 4 Peters's Sup. Court. R. 139; *Center v. Amer. Ins. Co.* 7 Cowen, 564; *Clarkson v. Phoenix Ins. Co.* 9 Johns. R. 1

The abandonment was sufficient. No particular form is required. It is only necessary that the act should be explicit, or plainly implied. The statement and claims contained all the elements of an abandonment. 2 Phillips on Ins. 316; *Patapsco Ins. Co. v. Southgate*, 5 Peters's Sup. Court R. 604, 622; *Cassedy v. Louisiana State Ins. Co.* 18 Martin, 421. The statement presented to the defendants was more than a mere claim for a total loss. It necessarily implied an abandonment. It will be said, that it contained no transfer of the vessel. But insurers do not rely on the informal paper by which the abandonment is made. They take a regular bill of sale; and, in the present case, the assured would have been obliged to give a bill of sale of the vessel, if it had been required. 2 Phillips on Ins. 317, cites *Houstman v. Thornton*, Holt's N. P. R. 243. If the abandonment was not made in proper form, it was the duty of the president of this insurance office to have informed the plaintiff, that such was the case. But no objection was made to the abandonment, at the time, on this ground. It is abundantly settled, that an abandonment may be made verbally. *Parmeter v. Todhunter*, 1 Campb. 541; *Reed v. Bonham*, 3 Brod. & Bing. 147; *Benecke on Ins.* 422; *Hughes on Ins.* 429.

Fletcher and Peabody, for the defendants. The sale of the vessel by the master was not justified by the circumstances, and did not render the loss total. *Bryant v. Commonwealth Ins. Co.* 13 Pick. 544; *Winn v. Columbian Ins. Co.* 12 Pick. 279; *Hall v. Franklin Ins. Co.* 9 Pick. 466; *Gordon*

v. *Mass. F. & M. Ins. Co.* 2 Pick. 249 ; *Patapsco Ins. Co.* v. *Southgate*, 5 Peters's Sup. Court R. 604. The master is not authorized to act for the owners in such case, unless it is impracticable for them to act for themselves ; but where they can be consulted, he is not justified in selling without authority from them.

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If the sale did not, *ex proprio vigore*, render the loss total, then an abandonment was necessary. By *abandonment* is meant the transfer of some property ; it must transfer the title ; and should be in writing. How can the insurers claim the property insured and enforce their claim against any one having possession thereof, unless they have an abandonment in writing, as evidence of their title ? Now the statement presented to the defendants in the present case, so far from giving them a title to the vessel as against the purchaser, actually affirms the sale, by crediting the defendants with the proceeds. It is clear that this was not a sufficient abandonment. 1 Phillips on Ins. 382, 447 ; Marshall on Ins. 610 ; *Parmeter v. Todhunter*, 1 Campb. 542 ; *The lluson v. Fletcher*, 1 Esp. R. 73. By the sale and delivery of the vessel to the vendee, the insured were disabled from abandoning. 1 Phillips on Ins. 388 ; 2 Ibid. 284. At least the interest of the master in the vessel passed by the sale, he being a part owner, so there could be no abandonment ; for the entire subject of the insurance must be abandoned. 1 Phillips on Ins. 434, 435 ; Marshall on Ins. 600. If the insured paid the loss, they would be entitled to the whole vessel, instead of being tenants in common with the purchaser of the master's interest.

SHAW C. J. delivered the opinion of the Court. The only question in the present case, is whether the plaintiff is entitled to recover as for a total loss. Here the policy on the ship being on time, at all places at sea and in port, and in all employments, no question can arise respecting loss of voyage or of any particular employment or adventure, circumstances which have sometimes been complicated with other considerations in determining whether a particular disaster constituted a total loss. Another distinguishing characteristic of the present case is, that one of the owners and assured was himself master of the vessel, so that all question whether the master

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acted within the scope of the authority given by the owners, or conformed to the orders, and acted for the interests of the owners, is precluded.

The argument having turned upon all the questions, as to the rights of the parties, on the facts stated in the report, rather than confined to the particular points ruled at the trial, we have followed the same course.

In the first place, we think it perfectly clear, that the master, supposing him not to have been a part owner, and to have had no authority except that implied authority forced upon him as master, was not authorized to sell the vessel, so as to divest the property and leave nothing to abandon.

The principles upon which this implied authority is founded, and regulated and controlled, have been so fully discussed and considered in a series of recent cases, that it is sufficient to refer to them. *Gordon v. Mass. Fire & M. Ins. Co.* 2 Pick. 249 ; *Hall v. Franklin Ins. Co.* 9 Pick. 466 ; *Winn v. Columbian Ins. Co.* 12 Pick. 279 ; *Bryant v. Commonwealth Ins. Co.* 13 Pick. 544. Here was not that imperious uncontrollable necessity for a sale, which is requisite to confer such an authority on a master. Indeed there was scarcely any necessity, or expediency, other than to charge the underwriters, and close the concern.

The vessel struck and was injured on the Carysford reef ; but she was got off, proceeded with part of her cargo to Key West, without repairs, proceeded thence to Mobile her port of destination, discharged her cargo, and there remained at a wharf, in the possession and under the command of one of the assured, with full and entire power and liberty to dispose of her as he thought best. Mobile is a port and post-town of the United States, from which a communication might have been made to the underwriters, in fifteen or twenty days, either directly by a notice of abandonment, or through the agency of the plaintiff, a resident merchant in Boston. The parties there were all in a situation freely to exercise their legal powers, and stand upon their legal rights, unaffected by any urgent and uncontrollable necessity, compelling the master to act for the owners. If, then, the claim for a total loss, stood alone upon the fact of the sale, on the ground, that such a sale was author

ized by the exigencies of the case, and that thereby the property of the owners was rightfully and legally divested, it is very clear, that it could not be maintained. Indeed it is not mainly contended for on the part of the plaintiff. But it is alleged as a circumstance distinguishing this from the former cases, that here was a damage, by one of the perils insured against, so extensive, that if repaired, the cost would be so great, that the amount to be paid by the insurers, after the deduction of one third new for old, would exceed half the value of the vessel, when repaired. The plaintiff offered evidence to prove this fact, which was rejected as insufficient to support the claim if proved, and therefore, for all the purposes of this argument, it is to be taken that such was the fact.

The argument then on the part of the plaintiff stands thus ; that damage to the ship by one of the perils assured against, to more than half the value, is, of itself, a substantive technical total loss, which will constitute a legal total loss, if followed by a seasonable notice of abandonment ; that when such notice of abandonment is given, it relates back to the acts constituting a total loss ; that from the occurrence of a constructive total loss, the master becomes the agent of the underwriters, who of course are responsible for his acts ; that if he makes an unauthorized sale, under those circumstances, the underwriters and not the assured must abide the consequences, because the master is the agent of the underwriters ; that such unauthorized act of the master, goes only to diminish the amount of salvage, to which by the abandonment the underwriters are entitled, and cannot affect the claim of the assured to recover the whole amount of the underwriters. It is then contended, that here was a constructive total loss, that there was sufficient and seasonable notice of abandonment, and that this throws the responsibility of the intermediate acts of the master, including the unauthorized sale, upon the underwriters.

The principle upon which this argument is founded, is, as a general rule, correct, but it must admit of some exceptions and qualifications. And we think the rule does not apply in the present case, to throw the responsibility of the unauthorized sale upon the underwriters, for several reasons.

First, because, though the rule is applicable in a case where

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the master is a stranger, both to underwriters and the assured except so far as the relation of agent is created by the nature and duties of the office he holds, yet it is not applicable where the master is himself the assured, and does the act assumed to be unauthorized ; and secondly, because here was no sufficient right of abandonment, at the time the notice is supposed to have been given, and no sufficient notice of abandonment, for the cause now insisted on, to support the claim for a total loss.

The first of these objections is founded upon the peculiar circumstance in the present case, that the master who made the sale was himself one of the owners and assured. The objection stands upon two grounds ; one is, that a man can never aver his own unauthorized act, or other misconduct, as the foundation of a claim of right in himself ; and secondly, that if he had acted merely in pursuance of his supposed agency as a master, and from necessity, the owners might, as against the vendee, aver and show that there was no such necessity, that of course there was no such authority to sell, and of course that the property was not divested, and upon an abandonment the same right would be transferred to the underwriters, who might reclaim the vessel specifically and thereby avoid the consequences of such a sale, and the loss arising from it. But where a master stands in a double capacity, in one of which, namely, as master, he has no authority to make a sale, and in the other, as owner, he has such authority, and makes a sale, in whatever right or capacity he might profess to act, his act would take effect according to his authority. Being therefore owner, and as such having a right and power to sell, and being unauthorized to make a sale as master, his interest as owner would pass to the vendee, and he would thereby be incapacitated from making an effectual abandonment of the same interest and title to the underwriters. This very case is put by *Parker J.*, in delivering the opinion of the Court, in illustration of the general rule, that to make an effectual abandonment, the assured must have the power of transferring the subject at the time of the abandonment. In truth, it is the same as if the plaintiff, after capture and recapture of his ship, had thought fit, not from necessity, to sell her ; in which case he could claim nothing of underwriters, but an indemnity for her

diminished value, in consequence of the peril insured against. *Higginson v. Dall*, 13 Mass. R. 102.

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It seems, therefore, if this view of the case is correct, that if Tyler, the master, had been the sole owner, and made the sale under these circumstances stated, he would have been precluded from setting up such unauthorized sale, as the foundation of a claim, and the plaintiff having averred the insurance to be made on account of the owners and alleging the interest in them, would have stood on the same ground. Can the plaintiff then, in this action, distinguish between the interests of Waldo Peirce and Robert Treat, the other two owners, and that of Andrew Tyler, the master, and recover as for a partial loss upon one of those interests, and a total loss upon the two others ?

The averment in the declaration is of an interest in the three jointly, without alleging whether they were partners or tenants in common, and if tenants in common, in what proportions they were severally interested. Upon this declaration, therefore, as it stands, the interest of the parties as averred was a joint interest, they acted jointly in the claim, and there is nothing to show a several interest in the three persons respectively.

But the Court are strongly inclined to the opinion, that upon another ground the other two owners are bound by the act of Tyler in making the sale, and that is, subsequent ratification. The owners joined in a claim upon the underwriters, in which they set forth the sale of which they seem jointly to have received and credited the proceeds, and if they have ratified the sale, it has the same effect as if there had been a previous authority. If there was a previous authority or subsequent ratification, then the case stands on the same footing, as if Tyler had been the sole owner, and no form of claiming or declaring on the claim, could make any difference.

But it is of less consequence to consider whether, upon further averments and proofs, a better case could be made for the plaintiff, if the other part of the case is decisive.

It is a well settled rule, that upon a mere constructive total loss, there can be no recovery without an abandonment on the part of the assured ; that the right to abandon is a privilege which the assured may exercise or not, at his option ; and

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whether the loss exceed or fall short of half the value, the assured, without abandonment, may always recover an indemnity according to the full amount of his actual loss proved. This rule is applicable to all cases, but the reason of it is peculiarly obvious where the ship remains in specie, accessible to the parties, and where the only ground of constructive total loss is damage requiring repairs to more than half the value.

Without adopting the opinion given at the trial, that this abandonment was insufficient because not in writing, an opinion which perhaps may require further consideration, the Court are all of opinion, that here was no sufficient abandonment, upon several grounds.

It is stated in the report, that in order to prove an abandonment, the plaintiff proposed to offer evidence to show that about the 13th of May, when the facts became known in this city, and the papers arrived, the plaintiff called at the office of the defendants with the protest and other usual documents to prove the loss, and a statement of the loss made up by an insurance broker, and demanded payment of a total loss.

The statement thus presented purported to be the statement of a claim for salvage loss on the vessel, incurred in consequence of getting on the Florida reef, on her voyage from New York to Mobile, at which latter place she was surveyed, condemned and sold for the good of all concerned. It then charges the value of the vessel, and credits by way of salvage, the proceeds of the sale of the vessel, first deducting all charges.

The first objection is, that here is no abandonment in point of fact, no relinquishment of the vessel or of any interest in the vessel, but on the contrary, the claim proceeds on the basis of affirming the sale made at Mobile and treating it as a valid sale. Then the principle already alluded to, applies, that by making a sale, in fact unauthorized, they had incapacitated themselves from making a valid abandonment of the vessel, and could only therefore claim for a partial loss.

But if this is considered as putting too harsh a construction upon the act of the plaintiff, and it must be considered that his object was to present the state of facts to the underwriters, and

to claim according to the legal rights of those whom he represented, it may be proper to examine this proceeding further.

It is obvious, that the plaintiff himself not being the owner of the vessel, and having no power of disposing, had no capacity to abandon, except in virtue of an authority derived from the owners. Perhaps, however, in the absence of proof, he being the agent of the owners to insure, his agency might be presumed for this purpose, if there were no other ground of objection. Now supposing for the purpose of the argument, that the plaintiff was duly authorized to abandon, and that a parol abandonment was valid, still though no particular form of abandonment is necessary, yet in substance it must be positive and absolute, not fettered by contingencies, conditions, or limitations, and must, in express terms or by necessary implication, import an actual present relinquishment of the interest or subject matter to which the abandonment applies, and must truly state the reasons or grounds upon which the abandonment is made and a total loss claimed.

A question has been made, whether a claim for a total loss does not necessarily imply an abandonment. It is difficult to answer a question thus nakedly presented. Upon principle it would seem, that a mere claim for a total loss does not necessarily imply an abandonment, because in some cases a total loss may be recovered without abandonment. *Idle v. Royal Exch. Ass. Co.* 8 Taunt. 755. But commonly a claim for a total loss will be accompanied by a statement of facts and circumstances, by the reasons and grounds of claim upon which the assured proceeds, and such statements of the grounds of claim may perhaps carry as plain an implication of actual abandonment as could be done by express words: though it was stated by Lord *Ellenborough*, that an implied parol abandonment is too uncertain, and cannot be supported. *Parmeter v. Todhunter*, 1 Campb. 541.

But without considering other objections to this proceeding as an abandonment, there is one which goes to the merits and is decisive. It has already been mentioned as a requisite to a good abandonment, that it must state the reasons and grounds upon which a total loss is claimed.

The underwriters ought to be informed by the assured, who

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alone know the fact, of the nature of the constructive total loss, upon which the claim is made, that they may judge whether they will accept the abandonment, and that they may forthwith take the necessary measures which such an acceptance would render necessary and proper. And the assured cannot avail himself of any other ground, than that stated by him at the time of abandoning. The ground must be stated with sufficient certainty to enable the underwriters to decide whether they will accept the abandonment. If the ground stated is insufficient, they will be justified in refusing to accept it, and if there be another ground sufficient in fact, but no notice of it communicated to the underwriters, it is ineffectual to found a claim for a total loss, as if no abandonment at all had been made. *Suydam v. Mar. Ins. Co.* 1 Johns. R. 181. In the present case, the only act relied upon as constituting an abandonment by the plaintiff, was the presentment of the claim in writing as for a total loss, upon the ground of damage done to the vessel on the Florida reef, and of her being afterwards surveyed, condemned and sold, "for the good of all concerned." If this can be considered an abandonment by implication, it was not because the vessel had been so damaged as to require repairs to more than half her value, but for another and different reason, namely, because she had been condemned and sold. Upon this latter ground there was clearly no right to abandon, for the reasons before mentioned, and the underwriters were therefore right in rejecting the abandonment. Had the abandonment been made on the ground, that the vessel had gone into Mobile, requiring repairs to more than half her value, the underwriters would have known that as this abandonment was founded on a cause which preceded the sale, it would take effect so as to vest the property in them from the time of the happening of the cause on which it was founded, and if the sale was not made upon such necessity as to warrant it, it was void, and they could reclaim the property.

The Court are therefore of opinion, that if the plaintiff could now prove a substantive ground of total loss from damage to the vessel, requiring repairs to more than half her value, on her arrival at Mobile, and before the sale, which might have warranted an abandonment upon that specific ground, so as to

throw the responsibility of the master's unauthorized acts, including the sale of the interest of the two other part owners, upon the underwriters, still there was no abandonment upon that ground or for that reason ; the abandonment, therefore, did not relate back to a period anterior to the sale, so as to warrant the two other part owners in repudiating that sale, and throwing the responsibility and the consequences of it upon the underwriters, if upon other grounds they might have done so.

ROLAND G. HAZARD *versus* JOHN IRWIN *et al.*

In an action on a contract under seal, in which one of the contracting parties is seeking to enforce the contract against the other, the defendant may plead that the contract was obtained by fraud and imposition.

In an action on a contract under seal, whereby the defendants became sureties that one P. should perform his contract with the plaintiff, which likewise was under seal, it was *held*, that the defendants might plead that P's contract was voidable by reason of fraud and imposition, and that P. in consequence rescinded it.

Where the declaration averred that the plaintiff, by a contract under seal, sold and conveyed a steam engine to P., and that he gave P. an order for the engine, and that the defendants, by an instrument under seal, became sureties for the payment of the debt due by P., and the defendants pleaded that the plaintiff falsely and fraudulently made representations as to the engine, by reason whereof the contract of sale was void and P. refused to perform the same, wherefore the instrument executed by the defendants was void, it was *held*, that as it did not appear by the record that the engine had been delivered to P., the plea was good, especially after verdict, although it did not aver that the engine, or the order for its delivery, had been returned to the plaintiff.

Held also, that the defendants' contract, whereby they became sureties "for the payment of the debt due by P.," did not estop them from showing that the contract of sale was voidable and avoided, so that no debt was due from P. to the plaintiff.

The averment in the defendants' plea, that the plaintiff falsely and fraudulently made certain representations respecting the steam engine, and that by reason thereof the contract between P. and the plaintiff was void and P. refused to perform it, was considered, after verdict, as equivalent to an averment that P. had rescinded the contract.

It appeared that the plaintiff falsely and fraudulently represented to P. that the engine was a twenty-horse power engine ; that it was fit for mining purposes ; that it was in good order and had been so certified by engineers ; that it was free from rust ; that it had been standing but two or three years. It was *held*, that these false representations related to matters of fact and not of opinion ; and that as they were material to the interests of P., and had a tendency to prevent him from enquiring into the condition of the engine, and as he reposed confidence in them, they rendered the contract of sale voidable by him.

Held also, that P. was a competent witness for the defendants to prove such misrepresentations, he not being liable to the defendants for the costs of the action against them.

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If, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, to be true, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not.

THIS was an action of covenant. The declaration recited, that by a certain contract under seal, dated the 16th of March, 1833, and made by and between the plaintiff and one John Penman, the plaintiff sold and conveyed to Penman a certain steam engine with its appurtenances, at the rate of eight cents per pound for all the metal therein, and Penman covenanted to pay a portion of the purchase money, amounting to the sum of \$ 500, on the 27th of the same month, and the residue in three, six and nine months from the date of the contract, and to give satisfactory security for the payment of such residue ; that the plaintiff further covenanted, that, upon receiving the sum of \$ 500, and such security, he would give Penman an order for the engine &c., as it then stood in a building near the Santee River in South Carolina ; that on the 2d of April, 1833, Penman paid the plaintiff the sum of \$ 500, and, as security for the residue of the purchase money, executed and delivered to William Morrison, a conveyance in trust, of a gold mine situate in North Carolina, the deed being dated the 4th of April, 1833 ; that this deed recited the contract made between Penman and the plaintiff, and empowered Morrison, in case Penman failed to pay the residue of the purchase money when the same became due, to sell the mine and apply the proceeds to the payment thereof ; that the plaintiff then gave Penman an order for the engine ; and that on the 20th of April, 1833, after the deed in trust was delivered by Penman to Morrison, but before it was recorded, the defendants executed and delivered to the plaintiff a contract under seal, which was the subject of this action.

This contract was written on the back of a copy of the trust deed, and was as follows : “ State of North Carolina, Mecklenburg County. For and in consideration of the sum of five dollars to us in hand paid by R. G. Hazard, and for the further consideration of W. Morrison, trustee, having agreed not to have the within trust deed recorded or registered, we do

they acknowledge ourselves as sureties unto the said R. G. Hazard, for the payment of the debt due by said John Penman as recited in the within deed of trust. Given under our hands and seals, this 20th day of April, A. D. 1833."

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The declaration further averred, that the price of the engine, determined according to the provisions of the contract of sale, amounted to the sum of \$3,753.20; that the plaintiff performed all the covenants on his part to be performed by the terms of the contract between him and Penman; that when the instalments of the purchase money respectively fell due, the plaintiff made a demand on Penman, who refused to pay the same; and that the same had never been paid by Penman, according to his contract, nor by the defendants or either of them, according to the terms of their contract, but now remained unpaid.

The defendants pleaded several pleas, alleging that the supposed instrument in writing between the plaintiff and Penman, was obtained by fraud and misrepresentation, by the plaintiff's falsely and fraudulently representing, — that the engine was in perfect order, bright and clear of rust; that it was ready for immediate use, and was a good and perfect engine; that it was of twenty-horse power; that engineers had examined it and certified it to be in fine order; that the same, with the pumps and appurtenances thereto belonging, were fit for mining purposes; that they weighed about fifteen tons; that the whole expense, at eight cents a pound, would not exceed two thousand dollars; that the engine had been standing only two or three years; that the plaintiff could warrant it with the greatest safety to be in every respect a good engine and in perfect order; — that the plaintiff knew the representations to be false; that by means of these false and fraudulent representations Penman was induced to enter into the agreement with the plaintiff, for the performance of which the plaintiff alleges the defendants to be liable as sureties, by reason whereof the instrument made between Penman and the plaintiff, and also that made between Morrison and Penman, were void in law, and Penman refused to perform the same, or to pay any other or further sum of money in the first mentioned instrument provided

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to be paid ; and that, therefore, the instrument executed by the defendants was void.

The plaintiff replied, that the contract between himself and Penman was honestly and not fraudulently obtained ; and concluded to the country.

At the trial, before *Wilde J.*, the defendant offered evidence to prove the allegations in the pleas. This was objected to by the plaintiff, on the ground that it tended to inquire into and impeach the consideration of a sealed instrument ; but the objection was overruled and the evidence admitted.

The defendants also offered in evidence the deposition of Penman, which was objected to by the plaintiff, on the ground that Penman was interested in the event of the suit. But the objection was overruled and the deposition was admitted.

The judge instructed the jury, that the burden of proof was on the defendants to make out the allegations in the pleas ; that in order to find for the defendants, they must be satisfied, beyond a reasonable doubt, that the representations were material and made by the plaintiff to Penman before the contract was executed, that they were false, and that the plaintiff knew that they were false ; that if the plaintiff made the representations, alleging that he knew them, of his own knowledge, to be true, and they were in fact untrue, and material, and Penman was deceived thereby and induced to execute the contract, the contract would be void, though in point of fact the plaintiff did not know whether they were true or not, at the time when they were made ; but that this point was perhaps of little importance, if the jury believed the other evidence in the case ; that Penman was not so interested in the action as to be incompetent as a witness, but that he was interested in the question, and that this interest went only to his credibility, of which the jury were the judges.

The jury returned a verdict for the defendants.

The plaintiff moved for a new trial on the ground of the rulings above stated ; and also for judgment *non obstante verdicto*, on the ground, that the pleas were bad and insufficient in law and the issue immaterial.

March 19th.

Ward and Osgood, for the plaintiff. If this action were brought against Penman on the contract of sale, the facts set

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truth in the pleas would not be a defence. The alleged misrepresentations did not constitute a fraud in law, on the part of the plaintiff. They were mere statements of matters of opinion or judgment; and in such cases the law requires that the vendee shall judge for himself. There is no allegation of any concealment of latent defects, nor of any positive fraudulent act done on the part of the vendor, to prevent the vendee from examining for himself. *Harvey v. Young*, Yelv. 21, note; *Sweett v. Colgate*, 20 Johns. R. 196; *Sherwood v. Salmon*, 2 Day, 128; 1 Fizz. Nat. Brev. 94; Brown on Sales, 407; *Pickering v. Douson*, 4 Taunt. 779; 2 Kent's Comm. 381; *Baglehole v. Waters*, 3 Campb. 153. Besides, the contract of sale was reduced to writing, and the misrepresentations not being embodied in it, cannot be given in evidence. *Pickering v. Douson*, 4 Taunt. 779. Penman was to take the engine as it stood, which is equivalent to saying, *with all its faults*. It was an admission, that he took the risk and waived all rights he might have had from previous conversations.

But if the alleged misrepresentations did amount to legal fraud, still they could not be pleaded by Penman in a court of law, in bar to an action on the contract of sale, that being an instrument under seal, the consideration of which is not to be inquired into. If a deed be fraudulently misread, or another instrument substituted for that which the party intended to execute, the rule of law is different. *Vrooman v. Phelps*, 2 Johns. R. 177; *Dorr v. Munsell*, 13 Johns. R. 430; *Franchot v. Leach*, 5 Cowen, 506; *Dale v. Roosevelt*, 9 Cowen, 307; *Case v. Boughton*, 11 Wendell, 106; *Taylor v. King*, 6 Munf. 366; *Wyche v. Macklin*, 2 Randolph, 426; *Stubbs v. King*, 14 Serg. & Rawle, 208; *Dwight v. Pomeroy*, 17 Mass. R. 303; 3 Chitty on Pl. 963; *Haynes v. Maltby*, 3 T. R. 438; Com. Dig. (Day's edit.) *Estoppel*, A2, note; *Collins v. Blantern*, 2 Wils. 347; *Somes v. Brewer*, 2 Pick. 184. Penman himself could not have defended against such an action, unless he had rescinded the contract as soon as he found that the engine did not correspond to the representations, and had returned the order for its delivery, and given notice to the plaintiff of such rescission; but he has not done so. The pleas, it is true, allege that Pen-

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man refused to perform his contract with the plaintiff ; but that is not rescinding it. 3 Wheeler's Abr. 405 ; *Connor v. Henderson*, 15 Mass. R. 319 ; *Kimball v. Cunningham*, 4 Mass. R. 502 ; *Norton v. Young*, 3 Greenl. 30 ; *Campbell v. Fleming*, 1 Adolph. & Ellis, 40. The omission to set forth that the contract was rescinded, was material, and was not cured by the verdict. *Kingsley v. Bill*, 9 Mass. R. 198.

But if Penman could have pleaded these facts in bar to an action against him, these defendants cannot. The contract which is the subject of the present action is a distinct and original undertaking on the part of the defendants ; and certainly no fraud has been committed on them. 3 Kent's Comm. 87 ; *Read v. Curtis*, 7 Greenl. 136. If they are original contractors and strangers to Penman, they cannot set up this defence. They are estopped by their deed to deny that nothing was due from Penman to the plaintiff ; or, in other words, that the contract of sale was void ; and, besides, they received a consideration for their contract. Com. Dig. *Estoppel*, A2 ; *Bean v. Parker*, 17 Mass. R. 591 ; *Rainsford v. Smith*, 2 Dyer, 196 ; *Backwell v. Bardue*, 1 Mod. 113 ; *Collins v. Rybot*, 1 Esp. R. 157 ; *Ardern v. Rowney*, 5 Esp. R. 254. If Penman was induced to enter into the contract with the plaintiff by fraud, the contract was voidable but not absolutely void, and the property passed ; and the defendants, being strangers, cannot avoid it. 7 Bac. Abr. 66, *Void & Voidable* ; *Huscombe v. Standing*, Cro. Jac. 187 ; *Thompson v. Lockwood*, 15 Johns. R. 256 ; *Jackson v. Eaton*, 20 Johns. R. 479 ; *Wait v. Maxwell*, 5 Pick. 217 ; Brown on Sales, 396 ; *Somes v. Brewer*, 2 Pick. 199, cites Pothier on Obl. pt. 1, c. 1, § 1, art. 3, no. 29 ; *Rowley v. Bigelow*, 12 Pick. 312 ; *Fletcher v. Stone*, 3 Pick. 250.

The defendants should have restored the plaintiff to the situation in which he stood before the contract in suit was executed. *Daubeny v. Cockburn*, 1 Meriv. 643. They should also have alleged, that they were not aware of the fraud in the sale ; for if they entered into the contract in suit with full knowledge of such fraud, they would be bound by it.

Penman was interested in the event of the suit, and therefore his deposition was improperly admitted in evidence. The

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Defendants were sureties for him, and they are estopped by their contract to deny that they sustained that relation. 1 Phillips on Evid. 43 ; *Pierce v. Butler*, 14 Mass. R. 303. If the plaintiff should recover of the defendants, they would be entitled to an action against Penman ; and the judgment in the present action would be evidence of the amount paid by them on his account. 1 Phillips on Evid. 46. The interest of Penman is not equally balanced ; for the defendants, in their action against him, would be entitled to indemnity for the costs of this action. *Riddle v. Moss*, 7 Cranch, 206 ; *Hayden v. Cabot*, 17 Mass. R. 173 ; *Leavenworth v. Pope*, 6 Pick. 419.

C. G. Loring and Bartlett, for the defendants, cited to the point, that the deposition of Penman was competent evidence, *Bunter v. Tyndale*, 1 Barn. & Cressw. 689 ; *Birt v. Kirshaw*, 2 East, 548 ; *Ilderton v. Atkinson*, 7 T. R. 481 ; 2 Stark. on Evid. 746 ; that the defendants were *guarantees* and not *sureties*, *Oxford Bank v. Haynes*, 8 Pick. 423 ; *Hunt v. Adams*, 5 Mass. R. 358 ; that if the judge's charge was erroneous, yet if enough appeared to sustain the verdict, the Court would not grant a new trial, *Nathan v. Buckland*, 2 Moore, 156 ; *Horford v. Wilson*, 1 Taunt. 12 ; *Train v. Collins*, 2 Pick. 145 ; *Estwick v. Caillaud*, 5 T. R. 425 ; *Clark v. Dutcher*, 9 Cowen, 674 ; that the maxim, *caveat emptor*, does not apply, where the purchaser has no opportunity to examine for himself, or where the representation is made in such manner as to induce him not to examine, Chitty on Contr. 133 ; 2 Kent's Comm. 382 ; as to the effect of misrepresentations where a sale is made *with all faults*, *Shepherd v. Kain*, 5 Barn. & Ald. 240 ; *Fletcher v. Bowsher*, 2 Stark. R. 561 ; that the rule that fraud cannot be set up in a court of law to avoid an instrument under seal, has been adopted in those states only where there is a distinct court of chancery, but that even there the leaning of courts is against it, *Stevens v. Judson*, 4 Wendell, 471 ; *Stubbs v. King*, 14 Serg. and Rawle, 206 ; *Bliss v. Thompson*, 4 Mass. R. 492 ; *Somes v. Skinner*, 16 Mass. R. 348 ; *Somes v. Brewer*, 2 Pick. 191 ; and that if there was not a sufficient allegation that the contract was rescinded, the defect was cured by the verdict, *Ward v. Bartholomew*, 6 Pick. 409

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July 2d.

SHAW C. J. delivered the opinion of the Court. Much of the argument on the part of the plaintiff, is founded, we think, on a misapprehension of the force and effect of the plea. The argument is, that whether the defendants, upon the facts shown, are to be deemed either sureties or guarantors, in either character they are strangers to the contract of purchase and sale between the plaintiff and Penman, and cannot by their plea avoid that contract, or avail themselves of any fraud in it. This argument would certainly be very strong, and if the state of the pleas would warrant it, would be entitled to great consideration. Fraud in the terms of a contract of sale, renders it not absolutely void, but voidable at the election of the party defrauded. The rule is designed for his security and protection. If he is desirous to retain the commodity, and carry the contract into effect, although he has been imposed upon and cheated in the terms of it, he undoubtedly has a right so to do. He may be so situated, that although conscious that he has been grossly defrauded, yet so urgent may be his necessity for the immediate use of the article purchased, that he would rather submit to the imposition, than repudiate the contract. In such case, neither the other contracting party nor a stranger, can avoid the contract on that ground.

But we think this argument is not warranted by the pleas; but the pleas do state, not perhaps in the most precise and formal manner, but with a certainty sufficient after verdict, that the principal, Penman, did repudiate and rescind this contract. The general tenor of the averments in the pleas is, that the plaintiff, falsely and fraudulently, made certain representations, as to the age, condition, weight, power, and other circumstances of the steam engine, and by reason thereof, the contract between the plaintiff and Penman was void, *and*, Penman refused, that is, *and by reason thereof*, or in consequence thereof, Penman refused, &c. The term "refused," though often used with the term "neglected," when it is intended to aver the breach of a contract to pay money, and is properly used in that sense, yet has a more active meaning, and taken in its connexion here, may well mean, not merely a passive non-payment of money, but a refusal on demand, or a determination not to pay, and that determination signified to the party claiming to recover. Whatever must have been the construction of the

plea or demurrer, after verdict we think it is sufficient, and it must be taken that the language was thus understood, considered and applied upon the trial.

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The Court are also of opinion, that there was no necessity of making an express averment, that the engine was returned by Penman to the plaintiff, the vendor, because it does not appear by the record, that the engine was ever delivered to the vendee, or removed from the custody of the vendor, by the order. The averment of the plaintiff in the declaration, is, that by the contract, the plaintiff sold and conveyed the engine ; and though the execution of the contract of sale, and the delivery of an order to take the engine, might be a good constructive or symbolical delivery to vest the property in the vendee, yet it did not constitute such an actual change of possession and removal of the property into the custody of the vendee, as to render it necessary to aver a return to the custody and possession of the vendor. And for the same reason, it was not necessary to aver a return and restoration of the order. The order was merely to be used as a means of obtaining a delivery ; and the averment that the vendee, by reason of the fraud and imposition practised on him, refused to perform and fulfil the contract, and to make any further payment thereon, is equivalent to an averment, that he repudiated and rescinded the contract. This being the case, the order became inoperative and void, and the engine not having been removed from the actual custody of the vendor, it remained subject to his own control.

We are then brought to the material questions in the present case, whether the matter set forth in the pleas, is sufficient to avoid the defendants' contract. It is argued upon two grounds, first, that the fraud was not such as would enable Penman to avoid his own contract were the action against him ; but, secondly, if otherwise, the defendants cannot take advantage of it, because they are strangers, because there is no fraud shown in the contract between the plaintiff and them, because they are estopped by their deed, to deny that there was a debt due from Penman to the plaintiff. As to the matter of estoppel, it does not apply, because the stipulation is, that they will stand as sureties for the debt due, as recited in the deed

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of trust. Estoppels are not to be extended by construction. The deed would estop the defendants, perhaps, from denying the existence of such a contract and deed of trust, but not from showing either that it was voidable, and afterwards avoided, or otherwise invalid from some intrinsic vice, so that no debt was due upon it. Suppose it was discharged by payment, release or other matter subsequent, the defendants would not be estopped from showing it. Repudiating a contract, voidable on the ground of fraud, is matter subsequent precisely of the same character. The effect of the plea therefore is, not that the contract between the plaintiff and defendants is void, on the ground of fraud, but that taking it to be valid and in full force, there is nothing due upon it from the defendants, as sureties, because the original contract between the plaintiff and Penman having been justifiably repudiated by the principal, there is nothing due from him.

The question then recurs, whether the fraudulent misrepresentations set forth in the present case, are such as to warrant Penman, the purchaser of the steam engine, in repudiating and rescinding his contract. We take it to be a well settled rule, that in the case of a false and fraudulent representation by a vendor, in matter of fact, within his own knowledge, or which he affirms to be within his own knowledge, not as to matters of opinion, judgment, probability, or expectation, in a matter essentially affecting the interests of the other party, a matter in which he reposes confidence in such affirmation, and is in fact deceived by it, the party thus deceived may repudiate and rescind the contract at his election; and if the litigant parties are so situated in regard to the subject matter, that the rule can be practically and effectually applied, it shall avail as well in a court of law, as in a court of equity. Many cases may arise where, in consequence of an execution of the contract, in whole or in part, or by other means, the parties are so situated that by a mere repudiation of the contract, they cannot be placed *in statu quo*, in which case the party injured must seek his redress either in a court of law or court of equity, according to the circumstances of the case, and the nature of the redress sought. Where, however, the party committing the fraud, in an executory contract, is himself seeking to enforce

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such contract, proof of the fraud of the nature described, by a party having a right to set it up, is a good defence in an action at law. In the case of *Bates v. Graves*, 2 Ves. jun. 295, it is said by Lord *Loughborough*, upon the question, whether a reconveyance should be directed on setting aside deeds, as fraudulent, that "when the court has declared a deed to be set aside for fraud and imposition, it must suppose it would be equally set aside at law upon pleading it. In that case, I apprehend no estate passes. It is otherwise, if the estate has been conveyed to a third person," &c.

But it was contended in the present case, that the misrepresentations relied upon to invalidate the contract of sale, were of matters of judgment, or opinion, or matters of which the parties had equal means of inquiry and knowledge, and that, therefore, there was no such fraudulent misrepresentation as to constitute a fraud in law. It is undoubtedly true, that it is not every misrepresentation, every false or exaggerated statement, relative to the subject matter of the contract, which renders the sale void. It must be as to a matter of fact, substantially affecting the interests of the vendee, a matter in which he may be presumed to repose confidence, and one by which he is in fact deceived. The rule is cautiously stated by Lord *Ellenborough*. "A seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars, which the buyer has not equal means with himself of knowing, or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage, he would otherwise have made." *Vernon v. Keys*, 12 East, 637.

The difference between a false averment in matter of fact, and a like falsehood in matter of judgment, opinion and estimate, is well illustrated by very familiar cases in the books.

If the owner of an estate affirm, that it will let or sell for a given sum, when in fact such sum cannot be obtained for it, it is, in its own nature, matter of judgment and estimate, and so the parties must have considered it. *Hurvey v. Young*, Yelv 21 ; 1 Rol. Abr. 801, pl. 16 ; *Leachins v. Chissel*, 1 Sid. 146 But if an owner falsely affirm, that the estate is let for £30, when in fact it is let for £20, it is fraud, because the

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owner knows the fact, and on inquiry, by the vendee, the tenant might refuse to inform him, or give him false information.

In looking at the misrepresentations set forth, and which under the instruction of the Court, in matter of law, must, after verdict be taken to have been proved, we think, they were of matters of fact, not of opinion, that they were material to the interests of the vendee, that they had a tendency to prevent that inquiry and examination into the condition of the engine which the vendee would have otherwise made, and that the vendee reposed confidence in them. Of this character, peculiarly, was the representation as to the age of the machine, and the length of time which it had been in operation, a fact known to the vendor, which could not be known to the vendee, except by the information of others ; and that information might not be obtained, or might not be correct. Of the same character, in a great measure, were the representations, that it was in good order, and fit for immediate use, and had been so certified by engineers ; because in so complex a machine as a steam engine, it cannot be known whether it is in good order and fit for immediate use, by bare inspection, without being taken down, and the interior carefully examined by persons of skill.

It was, however, argued on the part of the plaintiff, that whatever might be the effect of the alleged fraud in defence of a suit on a simple contract, such a fraud is not pleadable in bar of an action on a deed or specialty. Several cases are cited in support of this position, from the decisions of the courts of New York, and the point seems to be there so settled by a series of cases. It is a little remarkable, however, that the original case, which constitutes the commencement of this series, is hardly an authority for the point. *Dorlan v. Sammis*, 2 Johns. R. 179, note. The case was debt on bond, for the price of a slave ; the defendant relied on the fact, that the negro was free and not the property of the plaintiff, when he sold her ; a mere failure of consideration, and with no averment of fraudulent representation. The court ask, "can a defendant in a court of law get rid of a bond, given on a sale of a chattel, on the ground of failure of consideration ? There is no allegation that the plaintiff sold the chattel fraudulently and knowing that he

had no title. There is no case in which a bond can be set aside, but where the consideration was void in law, or where there was fraud." But it was afterwards ruled, that fraud cannot be pleaded to a specialty in a court of law, not affecting the execution of the bond itself; but these decisions are founded mainly on the consideration, that a more adequate remedy and one better adapted at once to discover the fraud, and to relieve against it, is afforded in equity. In one of the late cases on the subject, Chief Justice *Savage* says, "I confess I can see no very good reason why this defence should be excluded from a court of law, and the party sent into a court of equity; but so the point has always been decided." *Stevens v. Judson*, 4 Wendell, 473.

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But whatever may have been decided elsewhere, we think it has long been a settled rule in Massachusetts, that such a fraud as that set forth in this case, is a good defence as well to an action founded on a deed, as any other; it is rather acted on as a settled rule, than discussed and decided in any particular case. The cases cited on the argument, are cases in which the judgment of the Court, upon great consideration, proceeded upon this as a settled rule of law. *Bliss v. Thomson*, 4 Mass. R. 492; *Somes v. Skinner*, 16 Mass. R. 348; *Somes v. Brewer*, 2 Pick. 191. The second of the above cases was a real action, involving a question of title, and the deed, by which the plaintiff conveyed to the defendant, being shown to have been obtained by imposition and fraud, it was held that no title passed.

The last of the above cases assumed the same rule to be a settled rule of law; but the case was distinguishable in this, that the first grantee, who obtained the deed from the plaintiff by fraud and imposition, had conveyed the land to a *bonâ fide* purchaser without notice, and so it was held, that as against him the rule did not apply.

The general doctrine was also settled in a case in which the opinion was given by *Parsons C. J.* It is directly in point. It was on covenant, and the defendant pleaded that it was obtained by fraud and imposition, and the defence was held good. The question as to the relative jurisdiction of courts of law and equity is there considered. The learned judge concludes thus

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part of the case thus : " But when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in equity." *Boynston v. Hubbard*, 7 Mass. R. 119.

The Court are all of opinion, that in an action on a contract, though under seal, in which a party is seeking to enforce a contract against the other contracting party, a plea and proof that such contract was obtained by fraud and imposition, would constitute a good defence at law, and of course, that had this been a suit against Penman, he might have made this defence at law.

A question was made as to the competency of Penman as a witness. The Court are of opinion, that he was a competent witness, that the interest which he had was in the question and subject matter, that he had no interest in the event of the suit. If the defendants were to be considered as sureties for Penman, and so that there was a privity between him and them, if the plaintiff were to recover against them, they would have their remedy for a contribution only, and not for the costs, against Penman. It is not, as if they held an indemnity from him against costs as well as debt. If the plaintiff does not recover against the defendants, he is not barred of his action against Penman, and so Penman's interest is balanced. Considering them as guarantors to the plaintiff, upon an independent collateral contract, made on a distinct consideration, and so there being no privity between the defendants and Penman, the result we think would be the same. A recovery by the plaintiff against the defendants would be no bar to an action by the plaintiff against Penman, but such an action could still be sustained by the plaintiff against him, which might, perhaps, enure to the benefit of the defendants ; or the plaintiff might make an equitable assignment of his right of action to the defendants, to recover the amount against Penman, for their own relief and indemnity. In either event Penman has no legal interest in the event of this suit, and whatever objection lies against his testimony, it is to his credit and not to his competency.

Some objections were made to the instructions of the court in point of law, all of which I believe have been substantially

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considered, except perhaps this, that if Hazard made the representations, as of his own knowledge, to be true, and they were in fact untrue and material, and Penman was deceived thereby, the contract would be void, although the plaintiff did not know whether they were true or not. The Court are of opinion that this was correct, because in fact such an averment has all the elements and all the consequences of a fraudulent representation. To represent that he knows facts, which he does not know, and which in fact he cannot know, because they are not true, for the purpose of deception, is substantially false, and produces all the ill effects of falsehood.

I am aware that in one case it was held, that where a party affirmed that he knew a thing of his own knowledge, which subsequently turned out not to be true, it was held to be no fraud which would sustain an action. *Haycraft v. Creasy*, 2 East, 92. There was a difference of opinion among the eminent judges who decided that case. It was a case upon which the defendant was charged as having fraudulently recommended a third person as one entitled to credit. He had given the strongest evidence of his own belief, by trusting the same person to a large amount. Those who decided that he was not liable, as upon a fraudulent representation, put it upon the ground, that from the subject matter of the affirmation, that of the ability and solvency of a third person, it could only be a matter of opinion and judgment, and though he said he knew it of his own knowledge, nothing more could be understood, than that he had the strongest belief of, and confidence in the assertion.

But this case is entirely distinguishable, being one, where the subject matter is one of fact, in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks as of his own knowledge, and has no such knowledge, his affirmation is essentially false.

Judgment on the verdict, for the defendants

LEMUEL CUSHING *et ux. versus* LUCY ADAMS.

An obstruction of a way appurtenant to land in the occupation of a tenant at will, may be an injury to the lessor, although it do not affect the reversion, nor cause an abatement in the rent ; consequently the lessor may maintain an action of the case for such obstruction, upon showing that he has been damaged thereby.

Husband and wife may join in an action of the case for an obstruction of a way appurtenant to the wife's land, in their occupation or possession.

In such an action, an averment in the declaration, that the plaintiffs were seized of the land in demesne as of fee in right of the wife, was held, after verdict, to include virtually an averment of occupation or possession.

If a party having a right of way licenses the owner of the soil to build an arch over the way, but such owner unnecessarily and unreasonably obstructs the way in building the arch, an action on the case will lie for the abuse of the license.

ACTION on the case. The declaration set forth, that the plaintiffs, Lemuel Cushing and Fanny, his wife, were *seised in demesne as of fee in her right*, of certain premises, and had, for themselves and servants and tenants, the right to use and enjoy a certain passage way appurtenant to such premises, leading from the street to their woodhouse, as well for a foot-way as for wheel-barrows and for all other purposes ; and that the defendant dug and injured such way and obstructed it with stones, tubs of mortar and bricks, so that the plaintiffs were totally hindered and deprived of such way.

The defendant pleaded the general issue.

The cause was tried in the Court of Common Pleas, before *Ward C. J.*

The plaintiffs produced in evidence a deed made to the wife before their marriage, by which the premises were conveyed to her in fee, with the right of passing and repassing in the passage way as set forth in the deed. They then produced evidence that the defendant dug down a part of the passage way, so as to form a sudden rise which could not be passed by a wheel-barrow without great efforts, incumbered it with bricks, stones and tubs of mortar for a long time, and placed steps therein.

The defendant produced in evidence certain deeds, to show that she owned the land on both sides of the passage way. She also introduced evidence of a license from the plaintiffs to build an arch over the passage way, and insisted that the obstructions complained of were necessary in building the arch.

It appeared, that the premises mentioned in the declaration, were during the time when the way was alleged to have been so obstructed, in the possession of John Murdock, who occupied them as a tenant at will to the plaintiffs and not under a lease or contract in writing ; and that during such time no abatement was made in the rent on account of the obstructions.

The plaintiffs admitted that they had given a license to the defendant to construct an arch over the passage way, but contended that she had interrupted them in the use of the passage way for a much longer time than was necessary.

The judge instructed the jury, that if they were satisfied, that the plaintiffs owned the estate mentioned in the declaration, and that a right of passing in the passage way was appurtenant to such estate, and that the defendant had disturbed them in the use of it, by digging up a part of it, or placing steps in it and rendering it less useful and convenient to the plaintiffs than it had been before it was so dug up, then the plaintiffs would have a right to recover such damages as they had sustained ; that if the jury were satisfied, that the plaintiffs gave to the defendant a license to build an arch over the passage way, yet if in the construction thereof she had unnecessarily and unreasonably, and for a longer time than was necessary, disturbed and interrupted the plaintiffs in the use of the passage way, she could not justify it under such license ; and that although the injury complained of by the plaintiffs, if any was sustained, was done during the coverture, yet, inasmuch as it related to the real estate of the wife, she might join with her husband in this action.

The jury returned a verdict for the plaintiffs.

The defendant excepted to the instructions, as follows : —

1. This being an action on the case to recover damages for an obstruction to a passage way, and the declaration setting forth the seisin of the plaintiffs in the right of the wife, and claiming damages to the husband's own use, in order to entitle the plaintiffs to recover in this form of action, it was necessary to aver in the declaration, damages or injury to the reversion and to prove those damages or injury ; but no such damages or injury were averred or proved.

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2. The injury or damages, if any were proved, were done altogether to the life estate of Lemuel Cushing, who should have sued for such damages alone, without joining his wife.

3. It appearing, that during the whole of the time when such supposed obstructions existed, the premises in respect to which the easement was claimed, were in the occupation of Murdock, a tenant at will, and it not being alleged in the declaration or proved, that the plaintiff, Lemuel Cushing, had, in consequence of the obstructions, reduced the rent of such premises, it was manifest that he had sustained no injury, and that if any injury had been done, it had been sustained by the tenant; and therefore the defendant contended, that this action could not be maintained at all in the name of either the husband or the wife.

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Cook and Craft, for the defendant, as to the first ground of exception, cited 1 Chitty's Pr. 267; 2 Chitty's Pl. (5th Eng. ed.) 778, note; *Jackson v. Pesked*, 1 Maule and Selw. 234; *Baxter v. Taylor*, 4 Barn. & Adolph. 72; *Young v. Spencer*, 10 Barn. & Cressw. 145; *Bedingfield v. Onslow*, 3 Lev. 209; *Jesser v. Gifford*, 4 Burr. 2141; as to the second, *Sumner v. Tileston*, 7 Pick. 205; *Barnes v. Hurd*, 11 Mass. R. 59; and as to the third, *Baker v. Saunderson*, 3 Pick. 352; *Sumner v. Tileston*, 7 Pick. 198; *Barnes v. Hurd*, 11 Mass. R. 60.

Ward and A. W. Austin, for the plaintiffs, to the point, that this action might be maintained by the husband alone, or jointly by the husband and wife, cited *Baker v. Brereman*, Cro. Car. 419; Com. Dig. *Baron & Feme*, V and X; Com. Dig. *Pleader*, 2 A 1; 1 Roll. Abr. 348, *Baron & Feme*, T; and to the point, that as the possession of the tenant at will is the possession of the landlord, such tenancy would not preclude the plaintiffs from bringing this action, *Starr v. Jackson*, 11 Mass. R. 519; *Lienow v. Ritchie*, 8 Pick. 235; *Roscoe on Evid.* 380.

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WILDE J. delivered the opinion of the Court. On the trial of this case in the Court of Common Pleas, several exceptions were taken to the instructions of the Chief Justice to the jury, none of which appear to us to be well founded.

Upon the evidence in the case the jury were instructed, that

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if they were satisfied that the plaintiffs owned the estate mentioned in the declaration, and that a right of passing was appurtenant to the estate, and that the defendant had disturbed them in the use of it, the plaintiffs would have a right to recover such damages as they had sustained. It is objected to this part of the instructions, that no damage could have been sustained by the plaintiffs, but that if there was any injury, it was wholly done to the tenant. But we cannot know judicially that the plaintiffs have not been damnified. On the contrary, we are bound to believe that they have been ; for the jury have so found ; and whether they were justified in so finding by the evidence, is a question not open on these exceptions. The obstruction might have been prejudicial to the plaintiffs ; for they had a right to enter any time to terminate the lease at will, or to make repairs, and might have been prevented from so entering by the obstructions, and might thus be induced to continue a disadvantageous lease, or to suffer the tenements to be injured for the want of seasonable repairs.

Another exception to this part of the instructions is, that the plaintiffs cannot recover for any damages, except for damages done to the wife's reversionary interest, and that the jury should have been so instructed. But the court was not bound to give any such instruction, if the distinction were well founded ; for it is no good ground of exception to the charge of the court to the jury, that some material point has been omitted, unless on request the court should refuse to charge as requested. We are, however, of opinion that the distinction relied on, is not well founded.

This case comes within that class of cases in which, for an injury done to the wife's real estate during coverture, the husband may join the wife, or sue alone. Thus, for trespass on the wife's land, the husband has the election to sue alone, or join the wife. So if the wife has a right to all the top of certain trees, and the owner cuts them down, the husband and wife may join. *Tregmiell v. Reeve*, Cro. Car. 437. So if the wife's close has a prescriptive right of way through the close of another, and the owner of the land erects a building *ex transverso viâ*, the husband and wife may join in an action to

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recover damages for the stoppage during coverture. *Bac. Abi Bar. & Feme, K.*

The instruction in respect to the license is clearly correct, for although the abuse of a license in fact will not make a person a trespasser *ab initio*, yet undoubtedly an action of the case to recover damages for such an injury, may be well maintained.

In regard to the objection, that the plaintiffs were not in possession during the continuance of the obstruction, that is sufficiently answered by the cases of *Starr v. Jackson*, 11 Mass. R. 519, and *Sumner v. Tileston*, 7 Pick. 201, wherein it was decided, that the possession of the tenant at will is the possession of the landlord.

Some objections have been made to the declaration; but we think they cannot be maintained. It is said there is no averment in the declaration, that the plaintiffs were in possession. The averment is, that the plaintiffs were seised in their demesne as of fee, of the premises; and this virtually includes an averment of occupation or possession. *Bullard v. Harrison*, 4 Maule, & Selw. 392.

The objection, that there is no averment in the declaration, that the injury complained of was done to the reversionary interest of the wife, would be a fatal objection even after verdict, if this were an action for an injury done to the reversion; but as it is an action for an immediate injury to the plaintiffs' possessory interest, this objection is not applicable.

Judgment of Court of Common Pleas affirmed.

ANDREWS B. BREED *et al. versus* OLIVER PRATT.

A person under guardianship as *non compos mentis* may make a will, if he is in fact of sound mind at the time of its execution.

In the case of a will made by a person under guardianship as *non compos mentis*, appointing his guardian executor, and giving him a legacy, the executor is not estopped, by the fact of his guardianship, from showing that the testator, at the time of making his will, was of sound and disposing mind and memory.

Under such circumstances the fact of the testator's being under guardianship is *prima facie* evidence of insanity and incapacity to make a will, and therefore it is incumbent on the executor to show, beyond a reasonable doubt, that the testator had both such mental capacity and such freedom of will and action, as are requisite to render a will legally valid.

THIS was a case of probate appeal, tried at the bar of this Court. The decision depended mainly upon questions of fact on the evidence, but some points of law were ruled in the course of the trial.

Oliver Pratt, the respondent, offered the will of Benjamin Sargent, late of Chelsea, for probate ; a will in which he was appointed executor, and was also the principal devisee. The appeal was taken by the heirs at law, who resisted the probate of the will. It appeared that Sargent, the testator, was a man of peculiar character and habits, and had long been under guardianship, as a person *non compos mentis*, and for several years past, and at the time of making the will, Pratt himself had acted as his guardian, but under letters of guardianship issued without notice to the ward, and therefore contended to be void. It further appeared, that Pratt had married the only daughter of the testator, but she had deceased without issue before the making of the will. The several questions discussed were, upon the legal capacity of the testator to make a will, his sanity, and fraud and imposition of parties interested in procuring its execution.

J. Mason, Choate and Crowninshield, for the appellants.

Fletcher and Washburn, for the appellee.

The opinion of the Court was delivered by

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SHAW C. J. 1. In regard to the first exception, the Court are of opinion that the fact, that the testator was under guardianship at the time of the execution of the will, even had there been no exception to the legality and validity of the letters of

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guardianship, did not *de facto* disqualify him from making a valid will, nor does it operate as conclusive evidence of insanity. This point is now to be considered as settled by authority. *Stone v. Damon*, 12 Mass. R. 488.

Were this a new question it might perhaps deserve more consideration. The reasons in favor of adopting the rule, as assigned in the case cited, are certainly very strong ; a consideration the other way is, that to many purposes, a person under guardianship as *non compos*, cannot be regarded as acting *suo jure*, but his person and actions are to some extent under the control of others. But after all, this rather bears upon the question of fact, open to proof in each particular case, whether the testator did, in such particular instance, act freely and voluntarily, and had sufficient mental ability and intellectual power to perform the act. It is an act manifestly distinguishable from contracts and other acts to be done *inter vivos*, and involves no conflict of authority with the guardian in this respect, because the will cannot operate to any purpose, till the death of the testator, and by that same event, the authority of the guardian is determined.

2. The Court are also of opinion, that the executor in the present case is not estopped, by the fact of his guardianship, from showing that the testator, at the time of making his will, was of sound and disposing mind and memory. 1. Because the guardianship was *ipso facto* void in law, for want of notice to the ward ; *Chase v. Hathaway*, 14 Mass. R. 222 ; *Hathaway v. Clark*, 5 Pick. R. 490 ; for, although the guardian might be estopped *in pais*, by acts done as guardian, to deny the validity and sufficiency of such acts, it would not be on the ground of the void letter of guardianship, but on the ground of his having acted as such guardian. And 2. Because in this suit the executor claims to prove the will, not merely to establish his own bequests, but to establish the validity of the will, in order to give effect to the claims of all other persons having beneficial interests under it. In offering the will he acts as trustee for all persons interested. Though the executor has by far the largest interest in the present will, yet the same rule must apply as if his interest were a minor one. As an express, positive and legal incapacity, the fact of the existence of the

guardianship, had it been valid, did not disable the testator from making a will, nor did it operate by way of estoppel upon the guardian himself, to prohibit him, in the capacity of executor, from proving it. As evidence of actual influence, the void guardianship, understood and believed to exist, both by the testator and the executor, and to constitute the relation of guardian and ward between them, is to be considered as having the same effect as if it were in all respects valid.

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3. The relation of guardian and ward, inasmuch as it places the person and property of the ward in the custody of the guardian, when a will is made, beneficial to the guardian, is to be taken as strong evidence, bearing upon the point of the mental capacity of the testator and his freedom of will and of action; but it is to be taken as evidence, which may be met and controlled by counter proofs. It is *prima facie* evidence of insanity, and incapacity to make a will, and therefore it is incumbent on those who would establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid.

Upon the questions of fact, the Chief Justice proceeded to examine and state the evidence, and pronounced the opinion of the Court establishing the will.

Decree of Probate Court affirmed and proceedings remitted.

MARY GREENLEAF *versus* NATHANIEL FRANCIS.

In the absence of all rights acquired by grant or adverse user for twenty years, the owner of land may dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbour's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbour of water.

ACTION on the case. The declaration set forth, that the plaintiff was seised in freehold, for and during her life, of a dwellinghouse, with the land under and adjoining the same, the premises being in the occupation of Isaac Ripley as her tenant; and that there was an ancient cistern for holding the water which flowed therein, upon such land, whereby the

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plaintiff and the other persons residing in such house, had for a long time been supplied with good water ; yet that the defendant, well knowing the premises, but designing to injure the plaintiff, and to deprive her of the use and enjoyment of the cistern and water, wilfully dug a cistern upon his own ground, next adjoining the plaintiff's land, and so near to the cistern of the plaintiff, that all the water there was drawn from the cistern of the plaintiff into that of the defendant, whereby the plaintiff was much injured, &c.

At the trial, before *Morton J.*, it appeared, that the plaintiff's well was in her cellar, near the boundary line between her land and that of the defendant ; that the cellar was dug fourteen years before the commencement of this action, and that water was then found there ; that about two years afterwards an excavation was made in the earth, about three feet deep, in the place where the well now stands, and a barrel inserted therein ; that the water, which was of a good quality, rose to the surface, and was used by the tenant in that part of the house ; that about four years before the commencement of this action, the barrel was removed, and the excavation deepened and stoned up ; and that the defendant dug a well on his own land of about the same size and depth, and at about the same distance from the boundary line, as that of the plaintiff, the two wells being five feet apart, measuring from the interior of the stoning of the wells, but only three feet apart, measuring from the exterior of the stoning.

There was evidence tending to show, that the defendant's well was placed in the situation which was most convenient for his use. There was no direct evidence of any ill will in the mind of the defendant against the plaintiff ; but it appeared, that he ascertained the exact situation of the plaintiff's well, and dug his own as near to it as the party-wall between the cellars would allow.

The plaintiff requested the judge to instruct the jury, that if they were satisfied, that the defendant so placed his well, with the design and intent thereby to draw off the water from the plaintiff's well into his own, they should return a verdict for the plaintiff.

But the judge instructed the jury, that the defendant had a

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legal right to dig a well upon any part of his own land for the purpose of obtaining water for his own use ; that if he dug his well where he did, for this purpose, he was justified in so doing, although the effect might be to diminish the water in the plaintiff's well ; that if he dug the well where he did, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable in this action ; but that if he thus dug his well, for the purpose of accommodating himself with water, he was not liable for so doing, even if he at the same time entertained hostility towards the plaintiff and a desire to injure her, and these feelings were thereby gratified.

The jury returned a verdict for the defendant. The plaintiff excepted to the instructions.

If the Court should be of opinion, that these instructions were incorrect, a new trial was to be granted ; otherwise judgment was to be rendered on the verdict.

The case was argued in writing.

Prescott and Derby, for the plaintiff. For all the purposes of the present argument, it must be taken as proved, that the defendant, knowing that the plaintiff was in possession of a well, ascertained precisely its situation, and then dug one upon his own ground as near as possible to the plaintiff's well, with intent thereby to draw off the water ; that this was done with the design to benefit himself, regardless of the injury it might do to her ; and that, at the same time, he entertained hostility towards the plaintiff and a desire to injure her, and that these feelings were thereby gratified.

The plaintiff contends, that a person may have a complete and exclusive property in water contained in a well upon his own ground ; and that she had such a property in this water. It is objected, that she did not prove her well to be an *ancient* well. To this, there are two answers : 1. Although the well was not ancient, yet the water in it, which is the only subject of dispute, was an *ancient right*. The plaintiff and those under whom she claims, had possessed this spring, from the first settlement of the country. When they bought the land, they bought this spring, as completely as they would have bought a quarry or a mine of gold, which had existed unknown to grantor or grantee. 2. If this right was not ancient, still it was appro-

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priated as soon as found, and such appropriation is sufficient Angell on Water-Courses, *passim*; 2 Bl. Com. 402, 403; 2 Wooddeson's Lect. 391; 15 Viner's Abr. 399, *Mill, C.*; 16 Viner's Abr. 25, 29, *Nuisance*; *Sackrider v. Beers*, 10 Johns. R. 241; *Bealey v. Shaw*, 6 East, 208; *Cox v. Matthews*, 1 Ventris, 237; *Palms v. Heblethwait*, Skinner, 65.

Prescription is only useful inasmuch as it shows a grant, or rather as it necessarily supposes a grant, the proof of which is lost. Therefore, where no grant is necessary, no prescription need be shown; and no grant is necessary for water on one's own land. If two persons own land through which a river flows, one above and the other below, either of them may erect any works upon his own land, and use the water therefor, if he still leaves water enough for his neighbour for such uses as *he has previously put it to*, and the other thereby loses the right of erecting similar works upon his own land, if such works would interfere with the new right gained by his neighbour by his previous appropriation.

If the plaintiff then had a property in this water, she may have an action against one who knowingly and wilfully deprives her of it, although without any express ill will towards her. It will not be seriously contended, that a person may not have an action against one who has injured him, unless he can prove that the injury was caused wholly by *malice*. The malicious intent may be a very important inquiry in a criminal trial; it has no place in a civil action, unless perhaps to increase damages. *Taylor v. Rainbow*, 2 Hen. & Munf. 423; *Michael v. Alestree*, 2 Lev. 72; Year Book, 21 Hen. 7, p. 28; 1 Chitty on Pl. 129; *Reynolds v. Clark*, 1 Strange, 634; Buller's N. P. 25; *Thurston v. Hancock*, 12 Mass. R. 223.

But was there not malice in this case? There was a wilful determination, on the part of the defendant, to obtain for himself something then in the lawful possession of the plaintiff, and this accompanied with a feeling of "hostility towards the plaintiff and a desire to injure her, and these feelings were thereby gratified." Personal ill will is not a necessary ingredient in legal malice.

The true distinction is this. Any person may dig a well on

his own land, and if in so doing he accidentally and undesignedly drains another well, he is not answerable therefor ; but he shall not be permitted to inflict this injury wilfully ; and if he, first ascertaining the position of his neighbour's well, places his own in a situation *calculated* and *designed* to deprive his neighbour of his water and appropriate it to himself, he will be accountable for the whole injury he thus wilfully inflicts.

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C. P. Curtis and *B. R. Curtis*, for the defendant, cited *Thurston v. Hancock*, 12 Mass. R. 220 ; *Wyatt v. Harrison*, 3 Barn. & Adolph. 871 ; *Lasala v. Holbrook*, 4 Paige, 169 ; Dig. lib. 39, tit. 3, lex, 1, § 12 ; Ibid. tit. 2, lex, 24, § 12 ; Ibid. tit. 2, lex, 26 ; Merlin, Recueil de Qu. de Droit, tit. *Denonciations de Nouveles Ouvres*, § 1.

The case under consideration is free from any evidence of malice or design to injure, on the part of the defendant.

PUTNAM J. delivered the opinion of the Court. This is an action of trespass upon the case for diverting water, which the plaintiff alleges belonged to her, and which would have run into her well, if the defendant had not obstructed it. The supposed obstruction was made upon the defendant's soil. It is a claim against common right, and must be proved by the party who makes it. For by the common law the owner of the soil may lawfully occupy the space above, as well as below the surface, to any extent which he pleases, unless he has made some grant or agreement or there has been some statute or police regulation to the contrary. These easements may be upon or above the surface, as by right of way, of air and light, or below the surface, as by right to dig in the soil of another, and lay pipes for an aqueduct through it, &c. And if they are not established by proper evidence, they cannot be maintained against the will of the proprietor, but may be removed by his own authority. "Every one has the liberty of doing in his own ground whatsoever he pleases, even although it should occasion to his neighbour some other sort of inconvenience. Thus, he who is not subject to any service may raise his house as high as he pleases, although by the said elevation he should darken the lights of his neighbour's house." "For this kind of work alters nothing in the fabric of the other house ; and he, who is the master of the house, ought to have placed his

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lights so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might easily have foreseen." 1 Domat's Civ. Law, *tit.* 12, § 2. *Vid.* 3 Ayliffe's Civ. Law. *tit.* 5. page 307.

The lots of the plaintiff and defendant adjoin each other. And the case finds, that the plaintiff's cellar was dug fourteen years ago, and water was then found, and in about two years afterwards an excavation was made in the earth, in the place where the well now stands, about three feet deep, and a barrel was inserted, and the water rose to the surface. Afterwards the defendant dug to obtain water in his own soil, and in a place where it was convenient for him, near to the well of the plaintiff, and after the defendant's well was dug, the water ceased to flow into the plaintiff's well, so copiously as it did before. It is for this alleged injury that the action is brought.

Then it is to be considered, whether the plaintiff has proved any such easement, as she claims to have in the soil of the defendant. She does not pretend, that there has been any written grant from the defendant. She relies upon the use, as evidence from which a jury should presume a grant ; and there is no other circumstance to be relied upon. But by our law, the right of the plaintiff to control the operations of the defendant on his own soil must, in the absence of a written agreement, be made out by an adverse possession continued peaceably under a claim of right for twenty years at the least. In the present case such proof is wanting. There is not evidence of any adverse use or possession at all. For the defendant had no means of knowing that the plaintiff's well was supplied by springs in the defendant's soil, until the defendant dug for water there for his own use. He sustained no injury by the use which the plaintiff made of the water she found in her own well ; and the use, if it had been adverse, has not been continued for twenty years. Indeed there is nothing in the case at bar which limits or restrains the owners of these estates, severally, from having the absolute dominion of the soil, extending upwards and below the surface so far as each pleases ; each, however, by the law, being held so to operate below the surface as not to cause the soil to fall in from the adjoining estate. These rights should not be exercised from mere malice ; and

so the judge ruled at the trial. But the proprietor, in the absence of any agreement subjecting his estate to another, may consult his own convenience in his operations above or below the surface of his ground. He may obstruct the light and air above, and cut off the springs of water below the surface. The proprietor must, at his peril, so place his house and make his excavations below it, as to obtain water, air and light, even if his neighbour should exercise his full rights of dominion upon his adjoining estate.

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Now the case finds, that the defendant dug his well in that part of his own ground, where it would be most convenient for him. It was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuriâ*.

Judgment on the verdict.

SAMUEL SWETT *versus* The City of BOSTON.

A testator gave to his daughter, a feme covert, "the interest of 50,000 dollars, from the time of his decease, during her natural life, at her decease the principal to be equally divided among her children;" and his executors, being residuary devisees and legatees, gave bond to the judge of probate for the payments of all the debts and legacies. It was *held*, that the testator did not intend to place the sum above mentioned in trust for his daughter, and secure to her the income thereof, but that he intended to give her a definite annual sum, equal to the lawful interest on 50,000 dollars, to be paid by his executors out of his estate.

The statute of February 28th, 1831, § 2, provides "that persons entitled to the income of any personal property held by others in trust for themselves, or for the particular and special use of their wives, shall be taxed for the capital or principal sum." It was *held*, that under the foregoing bequest there was no "capital or principal sum" owned legally or equitably by, or held in trust or otherwise for the testator's daughter, and that consequently she was not liable to taxation under this clause of the statute.

An investment of 50,000 dollars, made by the executors, without the consent of the daughter, in trust to pay her the income, was *held* to have no effect upon her rights in regard to taxation under the above provision of the statute.

THE parties agreed upon the following facts.

The last will and testament of William Gray, duly proved in October, 1825, contains these provisions:—

"1st. I appoint my five sons, (naming them,) or the survivors of them, my executors."

"3d. I also give to my said daughter, (Lucia, the plaintiff's

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wife,) the interest of fifty thousand dollars, from the time of my decease, during her natural life, and at her decease the principal to be equally divided among her children, (naming them,) or the survivors of them at her decease."

"4th. If at the time of my decease any one of my sons should be so situated as that, in the opinion of my said executors, I should have desired to make further provision for him or his family, I will that my executors aforementioned cause a sum, not exceeding fifty thousand dollars, to be invested in such funds as they think proper, the income to be appropriated to the use of such son during his life, and at his decease to be equally divided among his children."

"5th. I give the whole residue of my estate, real, personal and mixed, to my five sons, in equal portions."

The executors gave bond to the judge of probate to pay the debts and legacies ; and they have not returned any inventory nor rendered any account to the Probate Court.

The plaintiff received of the clerk or agent of the executors, the annual payments of six per cent on \$ 50,000 for the years 1826 and 1827, under the name of interest on the legacy in the will.

In December 1827, the executors, of their own accord and without any agreement with the plaintiff or his wife, deposited in the office of the Massachusetts Hospital Life Insurance Company the sum of \$ 50,000, on a policy or contract made with the company. By this contract it was provided, that the company should annually, during the life of Lucia Swett, cause to be paid to her the same rate of interest on the sum deposited, as the company should receive upon their capital stock and the other property in their possession, after deducting necessary expenses and charges ; that in case she should be living at the expiration of five years from the date of the instrument, the executors and the company, respectively, should have the right to withdraw or pay off the principal sum so deposited, giving sixty days previous notice of their intention so to do ; that this right of withdrawing or paying off the deposit should be renewed at intervals of five years so long as the trust should so continue ; and that the company should, in sixty days after her decease, assign and pay the amount of the principal sum and

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all interest due thereon, to the executors, in trust, to be distributed according to the will. Under an assurance from the executors to the plaintiff, that on his receiving the annual payments on this contract, they would pay him as much in addition thereto as would make the annual payments under the will amount to six per cent on \$ 50,000, but without binding themselves to do so longer than they pleased, the plaintiff has received such payments from the company and such balances from the executors, up to January, 1835.

In May, 1835, the plaintiff was assessed by the city of Boston, in the following words :— “ On personal estate held in trust by William Gray’s executors for the use of Mrs. Snett, \$ 211.50.” The amount of this tax is the same as it would have been, had the plaintiff been the owner of the same sum of \$ 50,000.

A warrant was issued against the plaintiff, and in pursuance thereof he was compelled to pay the tax, and this action was brought to recover back the amount.

If the Court should be of opinion, that the plaintiff could recover the money so paid by him, in any form of action against the city of Boston, the defendants were to be defaulted and judgment rendered for the amount paid, with interest and costs ; otherwise a nonsuit was to be entered.

The statute of February 28th, 1831, § 2, under which the assessment upon the plaintiff was made, provides “ that persons entitled to the income of any personal property held by others in trust for themselves, or for the particular and special use of their wives, shall be taxed for the capital or principal sum in the town where such persons reside.”

The case was argued in writing.

Snett, pro se. The intent and operation of the will, are, not to create any trust fund for the plaintiff’s wife, but to give her an annual sum of \$ 3,000, that is, a sum equal to the interest on \$ 50,000, at the rate of six per cent. The executors, therefore, were not authorized to establish any trust fund for her use. Neither have they done so ; on the contrary, by giving bond to the Probate Court for the payment of debts and legacies, they have made themselves personally responsible for the annual payment of the sum of \$ 3,000. The investment in

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the Life Insurance office was made after they had given such bond, and was, therefore, not of the assets of the testator, but of the personal property of the executors ; and if the company should become insolvent, the loss would fall upon the executors and not upon the legatee. It was made too without the assent of the legatee, and instead of \$ 3,000 it yields annually less than \$ 2,500 ; and to allow the executors to replace the legatees security on their bond, by this security of far inferior value, would be unjust and illegal. But supposing that a trust fund exists in the hands of the executors, or of the Life Insurance Company, the tax is not in conformity to the statute. The construction of the statute by the assessors, would make it unjust and unconstitutional. They have taxed the plaintiff as if he were the owner of the fund and for its full value ; whereas his interest is only a life estate, during the life of another person, in the income of the fund. The value to him is simply of an annual income, and ought to be taxed as other incomes, or it ought to be subject to a deduction, as all money at interest is, of all money for which the party taxed pays interest ; otherwise a poor man may pay the tax of a rich one, and the tax be disproportional ; which the constitution prohibits. The income which the plaintiff receives is \$ 3,000 ; the fund which raises this sum is necessarily uncertain, and the tax on any specific sum as capital, is therefore void for uncertainty. It does not follow, that because the tax on the executors for the fund in the Life Insurance office has been held to be illegal, (*Gray v. Boston*, 15 Pick. 376,) the plaintiff is to be taxed for that fund.

J. Pickering, City Solicitor, for the defendants. It having been decided in *Gray v. Boston*, that the executors were not liable to be taxed for the property now in question, it is obvious that this whole fund of \$ 50,000 will not be taxed, unless it can be assessed in some form to the plaintiff. It could never have been the intention of the legislature that property so situated should escape taxation. The statute does not use the term " trust " in the technical signification, but in a more enlarged and popular sense ; to comprehend all descriptions of " personal property " held by one person for the benefit of another. But if it should be taken in a more restricted sense,

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the provision in the will might be deemed to create a trust, within the rules recognised by this Court, the executors being the trustees. *Saunderson v. Stearns*, 6 Mass. R. 37 ; *Farwell v. Jacobs*, 4 Mass. R. 634 ; *Smithwick v. Jordan*, 15 Mass. R. 113. Or if necessary, in order to avoid any embarrassment from the doctrine of trust estates, the clause of the statute may be read thus :— “the income of any personal property held by others, in trust for themselves, or [held] for the particular and special use of their wives,” &c. without designating it as being held in trust or otherwise. The plaintiff objects, that admitting a trust fund to exist, the tax is not conformable to the statute. The language of the statute is explicit and unambiguous, and the question is simply, whether the fund in question is held by other persons, either the executors or the Life Insurance Company, “for the particular and special use” of the plaintiff’s wife. If it is so held, then the plaintiff, being the “person entitled,” is liable to be taxed for it ; and according to the express language of the act, he is to be taxed “for the capital or principal sum,” and in the town where he “resides.” The tax has accordingly been assessed for the property in question to the plaintiff, who is admitted to be a resident in Boston. But the plaintiff further insists, that the tax is not conformable to the statute, because it is assessed upon him for the capital, and not for the interest or income, and is unconstitutional. The defendants answer, that the assessment is made literally according to the words of the statute, which do not provide for taxing the income of such funds ; and as to the constitutionality of this mode, the only question is, whether this portion of the property of the Commonwealth, in whose hands soever it may be, pays more than its equal share of the public burdens. The legislature have a perfect right to decide in whose hands it will be the most expedient to tax it. And as to the supposed hardship, which is urged by the plaintiff, he would have an adequate remedy by applying for an abatement, if it should be just and reasonable.

MORRIS J. delivered the opinion of the Court. In the city tax for 1835, the plaintiff was assessed in the following form, “on personal estate held in trust by William Gray’s executors for the use of Mrs. Swett, \$ 211·50.” This tax the

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plaintiff was compelled to pay ; and if it was invalid, he is entitled to recover back the amount with interest. There appears to be no inequality in the form of the assessment, and the only question for our determination, is the liability of the plaintiff to be assessed for the "principal sum" mentioned.

The assessment is founded on the last tax act, *St.* 1831, § 2, which provides, "that persons entitled to the income of any personal property held by others in trust for themselves, or for the particular and special use of their wives, shall be taxed for the capital or principal sum in the town where such persons reside." To bring the plaintiff within this provision, it must be made to appear that some "*capital*" was held in trust for him, the income of which belonged to himself or his wife.

The rules of construction to be applied to acts of this description were laid down and explained in the case of *Gray v. City of Boston*, 15 Pick. 376.

The late William Gray, by his last will, gave to his daughter Lucia, (the plaintiff's wife,) among other things, "the interest of fifty thousand dollars, from the time of my decease, during her natural life, and at her decease the principal to be equally divided among her children." What is the true construction of this clause ? Did the testator intend to create a trust fund, the income of which belonged to the plaintiff and his wife, and the principal of which vested in their children, to be paid to them on the death of their mother ? If so, then, should the fund be lost by misfortune and without the fault of the trustee, the one would lose the income and the other the capital.

We think the meaning of the testator is very clear, and that no intention to place this sum in trust for his daughter and her children is evinced in the will. If he had intended to create a trust fund, he would have used language clearly expressive of that intention, and not left it to doubtful construction and inference. This he did in the next clause, in a contingent provision for either of his sons who might become unfortunate after his death. We are of opinion, that in providing for this daughter the testator intended to give her a legacy, consisting of an annual sum during her life, and to give to her children a

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legacy of fifty thousand dollars, payable on the death of their mother, and that these bequests were absolute and not depending on any contingency, and were to be paid by his executors out of his estate. If the testator had directed his executors to pay to Mrs. Swett three thousand dollars, or any other specific sum, annually, and fifty thousand dollars to her children at her decease, there could have been no question as to the construction of the bequest. It would be perfectly clear that no trust was intended, and that neither the amount of the legacy, nor its certainty, would depend on the investment or the existence of any particular fund. We think this case is exactly similar, or rather the same thing. The interest of a particular sum is named as the measure of the annuity, and the bequest is as specific as if an exact sum had been specified, and the legacy no more depends upon the actual income of a particular fund, than if no definite sum had been named. What the precise amount of the annuity may be, whether it is fixed or liable to fluctuate, should the legal rate of interest be changed, are questions which we have no occasion now, and probably never shall have, to decide.

The statute requires that the tax be imposed upon the "capital or principal sum," and not upon any annual or other income. Now we think here was no "*capital or principal sum*," owned legally or equitably, or held in trust, or otherwise, for the plaintiff or his wife. The testator imposed upon his executors, an obligation to pay to Mrs. Swett, out of his estate, an annuity, during her life, and to pay a definite sum to her children. The performance of this duty they have secured by their official bond to the judge of probate.

It is scarcely necessary to remark, that the investment of fifty thousand dollars in the Hospital Life Insurance Company, can have no influence upon the plaintiff's liability to taxation. It was an act of the executors, not done in pursuance of any direction of the will, nor assented to by the plaintiff, and can have no effect upon the rights of himself, his wife or his children.

It has been strenuously contended by the defendant's counsel, that unless the plaintiff is liable for this tax, here will be a large amount of property not subject to taxation. And as it is

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the intention of the legislature to tax *all property*, we have been urged to give this tax act such a construction as will include this particular fund. There is no doubt that the intention of the legislature is to tax *all property*, not exempted, *equitably*; and that the tax act and other statutes regulating the assessment of taxes, are made with this object in view. And when a description of property is in danger of escaping taxation, these circumstances ought to have weight in giving a construction to the law. But they do not authorize us to give a forced and unnatural meaning to the language of the statute. With the greatest vigilance which can be exercised, some property will find crevices in the law through which it will escape the grasp of the tax maker and the tax collector. But when discovered, it is the province of the legislature, and not the court, to stop them.

This argument is founded upon the assumption, that here is a distinct sum set apart for a specific purpose and which can be taxed to no person except the plaintiff. But we think the assumption is not supported; and that this fund is as much liable to taxation as any other property in the hands of the executors. They are liable to be taxed for all the real and personal estate which they hold; and all money which they have at interest more than they pay interest for. They owe to the children of Mrs. Swett fifty thousand dollars, payable at her death. An amount equal to the interest on the same sums they are bound to pay to her during her life. If they have money at interest, this sum should be deducted from the amount, and a tax assessed upon the balance. But if they have invested their money in stocks or other property liable to taxation, then, like other men in debt, they may be taxed for property not *clearly* their own. In either view, this fund will not escape taxation.

The plaintiff is not taxed for this annuity as "income." And manifestly it cannot, according to the statute, be brought into the assessment under that denomination. The statute limits the income which is taxed, to such as is derived "from any profession, handicrafts, trade or employment, organized by trading at sea or on land." If the legislature deem an annuity like this, a proper subject of taxation, they will so amend the

law as to embrace it. But by the present statute, it is not liable to be taxed to the plaintiff in any form.

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The defendants defaulted, and judgment for the amount of the tax, with interest.

SOLOMON CLAPP *versus* JAMES W. LEATHERBEE.

A mortgage of real estate was made to secure the payment of a negotiable promissory note, and the mortgagee, not being in possession, assigned the mortgage, during the pendency of an action against him for slander, in order to avoid more effectually the judgment which might be recovered against him, and subsequently died solvent, and his administrator assigned the same mortgage to a *bonâ fide* purchaser, for a valuable consideration. It was *held*, that the prior assignment was fraudulent, and that it was void, under *St. 27 Eliz. c. 4*, as against such subsequent purchaser.

WRIT of entry, to recover the possession of certain mortgaged premises.*

The tenant pleaded the general issue ; also, a special plea in bar, setting forth a mortgage of the demanded premises, made by the tenant to Charles Newcomb, a conveyance by Newcomb of his interest therein to Thomas Tirrell, the death of Newcomb, and the subsequent conveyance of the same premises to the demandant by Lemuel Brackett, the administrator of the estate of Newcomb.

The demandant replied, that the conveyance of the demanded premises by Newcomb to Tirrell, was made without any valuable consideration, and with the intent to defraud the creditors of Newcomb, and such persons as should subsequently purchase the premises ; that it was accepted by Tirrell, well knowing the intent and purpose of the conveyance ; and that the conveyance subsequently made by Brackett to the demandant, was made *bonâ fide*, and for a valuable consideration paid by the demandant.

To this replication, the tenant rejoined, that the conveyance by Newcomb to Tirrell was not made and accepted with the intent to defraud the creditors of Newcomb, and such persons as should subsequently purchase the same premises, and thereupon tendered an issue to the country, which was joined.

* See *Clapp v. Tirrell*, 20 Pick. 247.

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At the trial, before *Morton J.*, it appeared, that the mortgage by the tenant to Newcomb was dated June 5th, 1826, and was given to secure the payment of his promissory note, of the same date for the sum of \$ 500, payable to Newcomb or his order in four years, with interest annually.

The demandant offered in evidence an assignment of the mortgage, dated July 27th, 1835, and executed by Brackett, the administrator of Newcomb, and proved that he paid the consideration expressed in the assignment, but he did not produce the promissory note.

The tenant offered in evidence an assignment by Newcomb to Tirrell, of the same mortgage, dated July 13th, 1831, and purporting to be made in consideration of the payment by Tirrell to Newcomb, of the principal and interest due on the mortgage. This deed was duly recorded on the day of its date.

The judge ruled, that this was a sufficient answer to the demandant's claim, under the general issue.

The demandant then offered in evidence a writ, dated June 30th, 1831, issued in favor of H. D. Cushing against Newcomb, claiming damages to the amount of \$ 3000, on the ground of defamation of the character of Cushing by Newcomb. It appeared, that the action was tried in the Court of Common Pleas ; that a verdict was rendered for Cushing for the sum of one dollar ; that Cushing appealed to this Court ; and that, at the November term thereof, in 1833, the action was dismissed, neither party appearing.

The tenant objected to the admission of this evidence, and of all other evidence offered for the purpose of proving that the assignment was made to defraud creditors and subsequent purchasers ; but the objection was overruled.

The demandant then introduced evidence tending to prove that the assignment from Newcomb to Tirrell was made for the purpose of defeating the judgment which Cushing might recover against Newcomb in the action of slander.

The estate of Newcomb was represented insolvent, but it appeared that it was solvent, the personal estate amounting to \$ 3009, and the claims allowed by the commissioners of insolvency amounting to \$ 295.

The judge instructed the jury in substance, that if it was proved to their satisfaction, that the assignment of the mortgage to Tirrell was made without consideration and for the purpose of defrauding Cushing, they should find the issues for the demandant, otherwise for the tenant.

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The jury returned a verdict for the demandant. The tenant moved for a new trial, on the grounds that the jury were misdirected, and that the verdict was against the evidence.

The case was argued in writing.

C. P. Curtis and *B. R. Curtis*, for the tenant. 1. The instructions of the judge were erroneous. One of the issues was, that the assignment was made by Newcomb with intent to defraud his creditors and such persons as should subsequently purchase the premises. The finding of the jury on this issue, under the instructions of the judge, was, that the assignment was made for the purpose of defrauding Cushing alone, who was not a creditor of Newcomb, within the meaning of *St. 13 Eliz. c. 5*, nor a subsequent purchaser. *Fales v. Thompson*, 1 Mass. R. 136; *Jackson v. Ham*, 15 Johns. R. 261; *Jackson v. Cadwell*, 1 Cowen, 622. In fact, there was no evidence, that the assignment was made with intent to defraud any subsequent purchaser of Newcomb. There is no subsequent purchaser from Newcomb, and, as he is dead, there cannot be any. *Roberts on Fraudulent Conveyances*, 34, 35; *Jackson v. Ham*, 15 Johns. R. 261.

2. The instructions were erroneous, because the administrator of Newcomb had no right by force of the *St. 27 Eliz. c. 4*, which relates to subsequent purchasers, to make sale of the debt due from the tenant and of the mortgage collateral thereto. The debt was personal property, and by *St. 1788, c. 51*, mortgages in the hands of executors and administrators are made personal estate to all intents and purposes. *Smith v. Dyer*, 16 Mass. R. 18. Unless the debt is transferred, no action can be maintained on the mortgage. *Wade v. Howard*, 11 Pick. 289. And a transfer of a debt secured by mortgage entitles the assignee to the benefit of the mortgage, without an actual assignment of the mortgage. *Crane v. March*, 4 Pick. 131. The *St. 27 Eliz. c. 4*, does not extend to personal estate. *Daubeny v. Cockburn*, 1 Merivale, 635; *Jones v. Croucher*, 1 Sim. & Stuart, 315; *Sugden on Vendors*, 648

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We deny, that a purchaser from an executor or administrator is within the statute.

3. The instructions were erroneous, because a negotiable note secured by a mortgage of real estate, of which the mortgagee has not taken possession, is not liable to attachment by creditors on mesne process or execution ; and consequently there cannot be a transfer of it, with intent to defeat or delay creditors, so that the same may be avoided *at law*, whatever may be done by a court of chancery. 1 Story on Equity, § 367, and cases there cited.

4. The instructions were erroneous, because even if the assignment was fraudulent as to creditors, it was good as to the assignor and all claiming under him. 1 Story's Equity, § 371, 425 ; Robert's on Fraudulent Conveyances, 641, 646 ; *Hawes v. Leader*, Yelverton, 196 ; *Packham's Case*, 6 Co. 18 ; *Osborne v. Morse*, 7 Johns. R. 161 ; *Drinkwater v. Drinkwater*, 4 Mass. R. 360.

As the personal estate of Newcomb is more than sufficient to discharge all the debts and charges of administration without this debt of the tenant, the creditors are in no way prejudiced or injured by the transfer to Tirrell ; and the administrator, in making sale of it to the demandant, acted as the agent of the heirs of Newcomb, and not of the creditors. *Drinkwater v. Drinkwater*, 4 Mass. R. 360. The present action is, therefore, an attempt by the heirs of Newcomb, through the instrumentality of the administrator, to defeat a conveyance, by which he chose to be bound, and to reclaim property, which he, the lawful owner, chose to give away. If the heir may sell the property to a purchaser, because the original transfer was fraudulent as *against subsequent purchasers*, what length of acquiescence would make the title under such a transfer valid, and prevent any, however remote, heir of Newcomb from setting up the same claims as the *immediate* heirs now do, provided the estate happens to remain in the family of Tirrell ?

Leland, contra. The demandant purchased the mortgage, *bonâ fide* and for a valuable consideration ; and the jury have found, under the direction of the judge, that the prior conveyance of the mortgage by Newcomb to Tirrell was made without consideration, and with a fraudulent intent. It was neccs

sary that all this should be proved, under the second issue, notwithstanding the form in which it was taken, was, that the conveyance from Newcomb to Tirrell was made with intent to defraud subsequent purchasers. The demandant did not claim to be a creditor, and the allegation, that the conveyance was made to defraud creditors, was not a material part of the issue.

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1. The instructions of the judge were correct, because all prior conveyances of real estate, without a valuable consideration, are deemed, in law, to be made with intent to defraud such persons as subsequently purchase the same premises *bonâ fide* and for a valuable consideration. *Otley v. Manning*, 9 East, 59 ; *Doe v. James*, 16 East, 212 ; *Doe v. Martyr*, 4 Bos. & Pull. 332 ; *Buckle v. Mitchell*, 18 Ves. 100 ; *Sterry v. Arden*, 1 Johns. Ch. R. 261 ; *Doe v. Roulledge*, Cowp. 705 ; *Ricker v. Shaw*, 14 Mass. R. 137 ; *Sexton v. Wheaton*, 8 Wheaton, 229 ; *Verplank v. Sterry*, 12 Johns. R. 536 ; *Seward v. Jackson*, 8 Cowen, 406 ; *Jackson v. Peck*, 4 Wend. 300 ; *Cathcart v. Robinson*, 5 Peters's Sup. Court R. 281 ; *Jackson v. Meyers*, 18 Johns. R. 425 ; *Damon v. Bryant*, 2 Pick. 411 ; Story's Equity, § 352, 361 ; *Read v. Livingston*, 3 Johns. Ch. R. 500 ; *Richardson v. Smallwood*, Jacob, 552 ; *Halloway v. Millard*, 1 Madd. R. 414.

2. The instructions were correct, because a conveyance of real estate fraudulently made by a man in his lifetime, is deemed to have been made with the intent to defraud such persons as purchase the same premises, *bonâ fide* and for a valuable consideration, after his decease, of those who succeed to his rights in the estate. *Burrell's case*, 6 Co. 72 ; Sugden on Vendors, 431 ; Atherly on Marriage Settlements, 202, 206 ; Roberts on Fraud. Convey. 384.

3. A mortgagee is a purchaser within the meaning of *St. 77 Eliz. c. 4. Newport's case*, Skinner, 423 ; Roberts on Fraud. Convey. 372 ; *Chapman v. Emery*, Cowp. 278. The assignment of the mortgage by Newcomb to Tirrell, with a fraudulent intent, was therefore void with regard to the demandant.

4. The *St. 1788, c. 51, § 1*, declares, that debts secured by mortgage of real estate, and the estates mortgaged, shall be assets in the hands of executors and administrators, as *persona estate*. But the nature of such property remains unchanged

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it is no otherwise personal estate than other chattels real. Estates for years are within the *St. 27 Eliz. c. 4. Goodright v. Moses*, 2 W. Bl. 1019.

5. As mortgages are within the *St. 27 Eliz. c. 4*, the notes, which they are given to secure, must be also within the statute. But if it should be otherwise considered by the Court, it would be no defence to this action, that the mortgage belonged to one person, and the note to another. *Crane v. March*, 4 Pick. 131. That is a question exclusively between the assignee of the mortgage and the holder of the note. If the holder of the note has obtained it honestly, he can compel the assignee of the mortgage to account to him for the value of the estate after it is recovered; but if fraudulently, he cannot recover any thing of the assignee.

6. The demandant contends, that the administrator of Newcomb had the same authority over the mortgage which Newcomb, by a fraudulent assignment, had previously conveyed, as Newcomb himself had. Neither of them could call in question the prior assignment, but either of them could give a good title to a *bonâ fide* purchaser of the mortgage for a valuable consideration.

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WILDE J. delivered the opinion of the Court. This case comes before us on an exception to the charge of the judge to the jury, and also on a motion to set aside the verdict, because it is not sustained by the evidence. The jury were instructed, that if it was proved to their satisfaction, that the assignment to Tirrell was made without consideration, and for the purpose of defrauding Cushing, they should find the issues for the demandant.

The counsel for the tenant contends, that this instruction was erroneous, because Cushing was not a creditor of Newcomb, and could not be defrauded by the assignment of the mortgage to Tirrell.

On the other hand, the counsel for the demandant insists, that a mere voluntary conveyance without consideration, is, in law, deemed fraudulent as against subsequent *bonâ fide* purchaser for a valuable consideration. And this position is fully maintained by the English authorities. Previously to the case of *Otley v. Manning*, 9 East, 59, this point was involved in not

a little doubt by conflicting decisions, which are very fully reviewed and considered by Lord *Ellenborough*, and in conclusion he remarks : " Thus stand the authorities on both sides of the question, and the weight, number and uniformity of those which establish the point contended for on behalf of the plaintiff, do, in our opinion, very much preponderate." The same doctrine is contended for by the demandant in the present case ; so that the decision in *Otley v. Manning* is directly in point, and fully sustains the position taken on behalf of the demandant. It was there decided, that a voluntary settlement of lands made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement, and although the settler was not indebted at the time, and no fraud in fact was intended ; for the law, it was held, would presume fraud, upon the construction of the *St. 27 Eliz. c. 4*, without admitting such presumption to be contradicted ; and that a different construction would have so narrowed the operation of the statute, as to leave the persons meant to be protected by it subject to almost all the mischiefs intended to be guarded against. And " certainly," says Lord *Ellenborough*, " it is more fit, on the whole, that a voluntary grantee should be disappointed, than that a fair purchaser should be defrauded."

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But although the construction of the statute respecting conveyances merely voluntary, is thus settled in England, we do not decide the case on this point ; because we are of opinion, that the assignment of the mortgage to Tirrell was not merely voluntary, but fraudulent ; and if so, then it is clearly void, according to all the authorities ; for in most, if not all the cases, in which it has been held that a voluntary conveyance may be good against a subsequent purchaser for a valuable consideration, the first conveyance was not merely voluntary, but was founded on a good or a valuable consideration. Such are the cases noticed by Lord *Mansfield*, in *Cadogan v. Kennett*, Cowp. 434, and in *Doe v. Routledge*, Cowp. 7. 5. These cases are generally founded on voluntary family settlements, made *bonâ fide*, and, as Lord *Mansfield* expresses it, without any imagination of fraud. But all the cases admit, that if there is any fraud in a voluntary conveyance, or it is merely color-

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ble, it can never be set up against a subsequent purchaser for a valuable consideration. Now it is clear from the evidence, that the assignment of the mortgage to Tirrell was colorable, covenous and fraudulent. There is not the slightest evidence to show that it was intended as a gift, but merely to enable Newcomb more easily and effectually to avoid the judgment which Cushing might recover against him in the action then pending. This was a fraudulent and iniquitous purpose, and the assignment was void as against Cushing, both by the principles of the common law, and by the *St. 13 Eliz. c. 5*. It has been argued that Cushing was not a creditor, and, therefore, the assignment was not fraudulent under the statute. But this position cannot be maintained. The statute declares void all feigned, covenous and fraudulent conveyances, made with the intent to delay, hinder or defraud creditors, or others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs; not only to the let or hindrance of the due course of law and justice, but also to the overthrow of all true and plain dealing.

This assignment then was clearly fraudulent, feigned, and covenous, and is therefore void as to subsequent purchasers, by the clear construction of the *St. 27 Eliz. c. 4*.

It has been argued, that the demandant is not a purchaser within this statute, because it relates only to real estate, and that mortgages are made personal property by the *St. 1788, c. 51, § 1*; but the statute only provides, that mortgages on real estate shall be assets in the hands of executors and administrators as personal estate, and shall not descend to the heirs. But although it is thus to be treated as personal estate, it is clearly real estate, because in a court of law the mortgagee is considered as the owner of the land, and by the same section, the administrator or executor may bring a real action to recover seisin or possession. Again, it is denied, that a purchaser from an executor or administrator is within the *St. 27 Eliz.*; but we can perceive no difference between the rights of such a purchaser, and of one who had purchased of the testator or intestate; and *Burrel's case*, 6 Co. 72, is decisive on this point. It is there laid down, "that if the father makes a lease, by fraud and covin, of his land, to defraud others to whom

he shall demise or sell it, (as all fraudulent leases should be so intended,) and before the father sells or demises it he dies ; and the son knowing, or not knowing, of the said lease, sells the land on good consideration ; in that case, the vendee shall avoid that lease by the said act ; for, inasmuch as it is intended and presumed in law, that every fraudulent lease is made to the intent generally to defraud purchasers, farmers, &c., within this generality every particular purchaser, farmer, &c. is included ; and the said act is very well penned, for the words of the act are general ; and it is not necessary that he who sells the land should make the former fraudulent estate or incumbrance ; but be the estate, &c. fraudulent *ut supra*, whoever sells (makes) it the purchaser shall avoid such fraudulent estate, &c."

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Upon these grounds we are of opinion, that the instruction to the jury was correct ; and it is manifest that the evidence fully sustains the verdict. The non-production of the note secured by the mortgage could only avail the tenant as evidence of payment ; and as that ground of defence was not set up at the trial, the objection comes too late. Nor can the other objection to the verdict as to the second issue, prevail ; for admitting that there was no evidence that the assignment to Tirrell was fraudulent against creditors, still the verdict is substantially, though not literally, correct. The part of the issue as to creditors was immaterial, for as the jury were justified in finding that the assignment was void as against subsequent purchasers, the other part of the issue becomes unimportant.

Upon the whole matter, therefore, we are of opinion, that the demandant is entitled to judgment.

**BENEDICT CRAMER *et al.* versus JAMES P. FLINT
et al. and Trustee.**

A policy of insurance on a quantity of sugar belonging to F. was made payable to W. of London, as collateral security for advances made thereon by W. A loss having occurred, and having been paid to his agent in Boston, it was *held*, that the agent was accountable to his principal only, and not to F., for any money received by him under this policy, and consequently could not be charged therefor under the trustee process, as trustee of F.

THE answer of Henry F. Baker, the trustee, set forth, that just before the service of the writ upon him, he received, as the agent of Thomas Wilson & Co. of London, and on their account, a certain sum of money, by virtue of a policy of insurance belonging and payable to them; that he was not accountable therefor to any other person than his principals, and that the defendants had not and could not have any claim against him therefor; that he had received a letter from his principals, intimating to him the propriety of paying over the whole of such money to D. & A. Jackson, of Plymouth, the owners of the brig *Cybele*, upon the cargo of which vessel the policy was written; that he was about to have paid the same to them; but payment was suspended by reason of the service of the plaintiffs' writ upon him as the supposed trustee of the defendants.

The following extract of a letter from Wilson & Co. to the trustee, dated November 6, 1834, was annexed to the answer: "We also hand you the affidavit of Capt. Appling, setting forth the claim of his owners, Messrs. D. & A. Jackson, of Plymouth, for freight on this sugar. After having secured the balance due us, you will of course dispose of any amount that may remain in your hands arising out of the recovery of the average, as may be proper under the circumstances." Also, annexed to the answer was a protest signed by Appling, in which it is stated that D. & A. Jackson had chartered the brig *Cybele* with the defendants, to be laden at Pernambuco with a cargo of sugars; and that Wilson & Co. furnished the credits for the purchase of the cargo; and that the defendants are indebted to the ship-owners in the sum of £ 359 sterling for the amount of deficient freight.

The cause was argued in writing.

C. G. Loring and *F. C. Loring*, for the plaintiffs. The supposed trustee, as the agent of Wilson & Co., received a sum of money under a policy of insurance effected here on a cargo of sugar belonging to the defendants, but for the purchase of which Wilson & Co. had made advances ; and to secure such advances the cargo was consigned to Wilson & Co., and the policy of insurance made payable to them in case of loss. If Wilson & Co. had directed their agent, to retain the amount of their claim, and to pay over the surplus to the defendants, it is clear that he would be liable to the defendants in an action for money had and received ; Paley on Agency, 311 ; *Freeman v. Otis*, 9 Mass. R. 278 ; and it seems to us, that the discretion vested in him by the letter of Wilson & Co. did not vary his liability to the defendants, and would not have availed him as a defence to such a suit, at least while the funds remained in his hands.

The trustee, in fact, did not receive this money from Wilson & Co., nor was he liable to them for it ; he received it from an insurance company, on a contract upon which Wilson & Co. had merely a lien, as security to the amount of their claim. Any surplus over that belonged to the defendants, and was received by the trustee to their use.

It will be contended, that the trustee, being an agent, is responsible to his principals alone, and that there was no privity between him and the defendants and therefore no accountability. Admitting the correctness of the general rule, that an agent is responsible to his principal only, there are exceptions to it. An agent who has received money from his principal to pay to a third person, is liable to the latter in an action for money had and received. Paley on Agency, 311 ; *Freeman v. Otis*, 9 Mass. R. 278. These authorities seem in point, especially if, as we contend, the trustee could not exonerate his principals by any other payment, than one made to or with the consent of the defendants.

Further, agents are personally liable, where money has been paid to them for the use of the principal under such circumstances that the party paying it might recover it back from the principal. Paley on Agency, 305. So, where an agent has

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received money to which his principal has no right, and notice is given him not to pay it over, an action may be supported against him ; and if the agent, at the time when the money is received, knows that his principal is not entitled to it, this is equivalent to notice. 2 Livermore on Agency, 261. Before the money was received by the trustee in the present case, he had instructions from his principals, that the whole of it did not belong to them, and he also knew, that the defendants were the real owners of the property insured, and that the insurance was made by them.

Bartlett, for the trustee, contended that nothing short of a clear direction from Wilson & Co. to pay over the money to the defendants, would have enabled them to maintain assumpsit against the trustee ; *Williams v. Everett*, 14 East, 582 ; *Wells v. Green*, 8 Mass. R. 504 ; and that the courts refuse to charge an agent as trustee, not because it cannot be known that the principal may not be injuriously affected, but because there is no indebtedment or contract as between the agent and the defendant : *Chealy v. Brewer*, 7 Mass. R. 259 ; *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass. R. 438.

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SHAW C. J. delivered the opinion of the Court. This question must be decided on the trustee's answers, and in order to charge him, it must appear that he had goods, effects or credits.

It seems, under the circumstances of the present case, as disclosed by the answers, to be wholly immaterial, whether the Jacksons had any claim upon Wilson & Co. or not ; the single question is, whether the trustee was *indebted* to Flint & Co., at the time of the attachment, so that they could have maintained an action against him. The Court are of opinion that they could not.

Baker was responsible to Wilson & Co. for the money in his hands, he received as theirs by their order, and in pursuance of a claim of theirs on the insurance company, admitted by them to be valid. Supposing, as is assumed in the argument, that the policy was on property of which Flint & Co. were the general owners, but payable on the face of it to Wilson & Co. in case of loss, and supposing it was intended, as between Flint & Co. and Wilson & Co., to stand as collateral

security only, still, as between the insurance company and Wilson & Co., by force of the contract, the whole amount was payable to the latter. They, on receipt of the money, would become accountable to Flint & Co., and the claim of Flint & Co. for any surplus, was upon them alone. This is in effect in the nature of a lien upon a contract or chose in action, an authority coupled with an interest. It is an authority to collect the debt and to appropriate it to a specific demand, or a general balance. It is very clear, that before the payment, the insurance company were under no obligation to Flint & Co. for the whole or any part of the money payable; nor could they have discharged themselves by undertaking to apportion the money, and by paying to Wilson & Co. the amount of their balance. When, therefore, it is said, that Wilson & Co. had only a lien on the money, and that the residue was the property of Flint & Co., the term must be understood as used not with legal strictness, but that they had a claim in nature of lien. Indeed, it is not contended that the company were not bound to pay the whole amount to Wilson & Co. The trustee, Baker, was a mere agent to receive the money for Wilson & Co., and a payment to him was in legal effect a payment to them. He had no authority to receive, and did not profess to receive the money, in whole or in part, for the principal defendants.

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If he was not responsible on the first receipt of the money, did any thing subsequently occur to render him responsible? Suppose Baker, as a general agent of Wilson & Co., had full authority to adjust and settle all accounts of his principal with Flint & Co., and pay over the surplus to them, if on such settlement there was any, still he would not, upon such settlement, become personally liable to an action, till by some act of his own he had made himself responsible. Had he paid them, the payment would have been the act of Wilson & Co., and not his own. The authority might have been countermanded

That an agent may be sometimes responsible in his own capacity, there is no doubt; as where he has received money under specific directions to pay it over to a particular person, for his use, he tacitly undertakes so to do, and is bound by

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common principles of good faith to do so ; or where he has received money for his principal, by mistake, that is, money which his principal had no just right to receive, if before he has paid over the money, he has notice of the mistake, he is personally bound to refund. But these principles do not apply. The trustee had received no orders ever to pay over the money to Flint & Co. ; on the contrary, so far as he had any intimation, it was to make a different appropriation, namely, to the Jacksons ; but at all events he was to exercise his judgment, and act with sole reference to the duty and the interests of his principals. Whether Baker would have acted within the scope of his authority or not, in paying the money to the Jacksons, or whether he would have been liable to Wilson & Co., as for a misapplication of their funds, seems not material ; the sole legal remedy of Flint & Co. was on Wilson & Co., and not on Baker.

It was contended, that as Wilson & Co. claimed only a certain amount of the money in Baker's hands, he must be responsible to Flint & Co. for the surplus, as the general owners of the property in respect to which the insurance was recovered. But it appears to us, that this view of the case does not vary the result. Wilson & Co. never disclaimed their legal right to the money. They stated, in their account and letters, what would be due to them to satisfy their balance, and they authorized Baker, in their behalf to dispose of the surplus, as should be proper, that is, according to his views of their duties and responsibilities. But such an authority unexecuted, did not make Baker a debtor either to Flint & Co. or the Jacksons. As between him and his principals, he was to see that the funds were applied as Wilson & Co. were bound to apply them, so that they might be secure. The money was originally received from the insurance company as the money of Wilson & Co. solely, the trustee was accountable to them only, and nothing occurred afterwards to create a legal liability to Flint & Co., and therefore he was not their debtor, and the moneys in his hands were not liable to be attached by the trustee process, as their property.

Trustee discharged.

TIMOTHY WIGGIN *versus* THE SUFFOLK INSURANCE COMPANY.

In the case of a double insurance, by two insurers, the party insured may elect to consider each insurer as liable to bear a proportionate share of a loss, and recover accordingly ; or to require either of them to pay the whole ; in which latter case, the one who pays the whole or a disproportionate part of the loss, would have a remedy against the other for a contribution.

Where in such case the party insured commenced an action on both policies at the same time, and one of the insurers paid into court one half of the actual loss, (first making certain deductions by way of set-off,) and the insured took the money out of court, it was *held*, that this was *prima facie* evidence, that he had made his election to consider each insurer responsible for one half of the sum actually at risk.

A vessel was insured by the defendants, by a policy providing that any "loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the insurers from the insured, when the loss becomes due, being first deducted ; and all sums coming due being first paid or secured to the satisfaction of the insurers, they discounting interest for anticipating payment." At the same time the insured gave the defendants a bottomry bond on the vessel, with sureties. Subsequently a policy on another vessel was underwritten by the defendants for the same person, containing the like provision respecting sums due and coming due to the insurers, and a provision prohibiting the insured from assigning the policy without the insurers' previous consent. This second policy was assigned to the plaintiff, with their consent, they "reserving to themselves all the rights expressed in the policy regarding premium notes, debts, &c." The first policy was not assigned. In an action by the assignee of the second policy for a loss, it was *held*, that the insurers must deduct from a loss on the first policy, all premium notes due from the insured, whether given before or after the assignment of the second policy, and must deduct the balance of such loss from the sum due on the bottomry bond ; and that they had a right to set off the balance remaining due on the bond after such deduction, against the plaintiff's claim, without first resorting to the vessel bottomried or to the sureties on the bond.

THIS was assumpsit, to recover the sum of \$ 10,000 insured by the defendants, for Barrett & Brown, upon property on board the brig Soule, at and from Boston to Antwerp. The action was commenced in April, 1835. The policy was dated the 8th of February, 1834. It contained the following clauses : "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof ; the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted ; and all sums coming due being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment." — "It is also agreed, that this policy

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shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers."

At the trial the plaintiff produced in evidence the invoice and bill of lading of 800 bags of coffee, shipped by Barrett & Brown on board the Soule, on February 14th, 1834, which were valued at the sum of \$ 17,185.19.

It was admitted, that the vessel sailed from Boston with this cargo, on or about the 14th of February, 1834, and had never since been heard from.

The plaintiff proved by a memorandum on the back of the policy, that the policy was transferred to him by Barrett & Brown, for a valuable consideration, on the 23d of June, 1834 ; and that the defendants assented to such transfer on the same day, by their memorandum in writing, also indorsed on the policy, in which they reserve "to themselves all their rights expressed in the policy regarding premium notes, debts, &c."

The defendants did not dispute their liability for a portion of the sum insured ; but they claimed the right to deduct by way of set-off : —

1. A premium note, dated January 2d, 1834, for the sum of \$ 201, given by Barrett & Brown for a policy on the barque Kent.

2. A premium note, dated January 11th, 1834, for the sum of \$ 121, given by Barrett & Brown for another policy on the Kent.

3. A premium note, dated January 8th, 1834, for the sum of \$ 376, given by Barrett & Brown for a policy on property by vessels from La Plata.

4. A premium note, dated February 8th, 1834, for the sum of \$ 126, given for the policy declared on in this action.

5. A premium note, dated September 26th, 1834, for the sum of \$ 158.50, given by Barrett & Brown for a policy on the schooner Charlestown.

6. A premium note, dated October 1st, 1834, for the sum of \$ 1, given for a policy on property from La Plata.

7. A bond, dated January 11th, 1834, given by Barrett & Brown as principals, and James Gibson and Z. B. Adams as sureties, to secure the sum of \$ 8000 lent on bottomry of the barque Kent.

It was admitted by the defendants, that the Kent had arrived in Boston, and had not been taken possession of by them ; and that she was sold by Whitwell & Bond, auctioneers, by order of the assignee of Barrett & Brown, the defendants at the time giving notice in writing, of their lien, to Whitwell & Bond ; and it appeared that Bond gave an obligation to account to the defendants for the proceeds of the sale of the vessel. No suit had been brought by the defendants against the sureties on the bond.

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Pelham W. Hayward, the secretary of the defendants, was called as a witness by them, and testified that the bond was unpaid ; and that a partial loss and a general average loss, amounting to the sum of \$4995.05, with interest in addition, were due from the defendants to Barrett & Brown under the policies for which the premium notes, Nos. 1 and 2, were given. The defendants contended, that this amount should first be deducted from the sum due on the bond, and that the balance, together with the premium notes, should be deducted from the loss claimed in this action.

The plaintiff called Adams as a witness, who testified, that he was, and for several years had been, the owner of real and personal estate exceeding in value the sum of \$8000, which was exposed to attachment.

The defendants offered evidence to prove, that an action was pending in this Court, in favor of the plaintiff against the American Insurance Company, to recover the amount due on a policy, dated February 8th, 1834, for the sum of \$10,000, effected by Barrett & Brown, "on coffee, on board brig Soule, at and from Boston to Antwerp ;" and that this policy was transferred to the plaintiff by Barrett & Brown, with the assent of the American Insurance Company.

The defendants also offered in evidence a writing, dated in December, 1835, by which it was agreed between the defendants and the American Insurance Company, that the two policies effected by Barrett & Brown upon property on board the brig Soule, should be considered as simultaneously executed by the two companies.

To the admission of this evidence the plaintiff objected ; but the objection was overruled.

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In each of the two policies assigned to the plaintiff, which are in the form now in use in Boston, it is "agreed, that if the insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, &c. ; and in case of any insurance upon the said property, &c. subsequent in date to this policy, the said insurance company shall nevertheless be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers ; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made."

The defendants also called William J. Hubbard, Esq. as a witness, who testified, that he was of counsel for the American Insurance Company in the action against them ; and that they paid into court the sum of \$ 4345.28, under the common rule, which, with the amount of the set-offs claimed by them, consisting of the balance due on a bottomry bond on the brig Tim, and sundry premium notes, was equal to one half of the sum of \$ 17,185.19, the amount of the invoice of coffee ; and that the plaintiff had taken the money out of court.

The plaintiff objected to the admission of this testimony, but the objection was overruled.

A verdict was taken for the plaintiff by consent, for the sum of \$ 10,500, which was to be reduced or enlarged according to the opinion of the Court.

The case was argued in writing.

C. P. Curtis and *B. R. Curtis*, for the plaintiff. We object to the deduction of any of the premium notes given after the assignment of the policy. *Jenkins v. Brewster*, 14 Mass. R. 291. The reservation in the memorandum of the defendants referred to their then *existing rights*. The right to create new credits was not expressly reserved and cannot be presumed.

The notes taken by the defendants for premiums on the Kent, cannot be deducted from the plaintiff's money, that is, paid with his funds, because there is in the hands of the de

defendants a fund expressly applicable to those debts, to wit, the amount due to Barrett & Brown, for general average and partial losses under the policies for which those notes were given. The Court will not permit the defendants to liberate the funds of Barrett & Brown from a debt due by them, and throw the burden on the funds of the plaintiff, thus enabling Barrett & Brown to evade the effect of their assignment, which was made for a valuable consideration.

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The same argument applies to the note No. 3.

The bottomry bond is not to be deducted. The defendants admit, that the partial and general average losses ought to be applied to this bond. The plaintiff does not object to this, after first deducting the unpaid premium notes of Barrett & Brown. But the balance of the bond cannot be set off in this manner without first resorting to the security which the defendants hold. They have or had a mortgage on the vessel, and two sureties on the bond, one of whom is shown to be alone able to pay the whole amount. The defendants will not be permitted to pass over the specific securities taken for this debt, and resort for payment to the plaintiff, who never entered into any agreement to become surety. *Drinkwater v. Goodwin*, 1 Cowp. 255. If the plaintiff is a surety, he is so only in proportion to his demands against the defendants; and if they part with the security in their hands pledged for the debt, the surety shall have the benefit of it; *Baker v. Briggs*, 8 Pick. 122; *Commonwealth v. Vanderslice*, 8 Serg. & R. 457; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; and a surety in Massachusetts has the same advantages at law that he would have in equity, if sued alone. *Baker v. Briggs*, 8 Pick. 122.

The defendants have omitted to take possession of the Kent, and have permitted the assignee of Barrett & Brown to sell her, the defendants giving notice of their lien. As the defendants do not show what she was worth, it will be presumed, that a vessel on which the sum of \$8000 was lent, was of sufficient value to secure the balance of the bond.

If the plaintiff is a surety to the defendants for Barrett & Brown, it is by force of a contract made subsequently to the engagement of Gibson and Adams; the plaintiff is, in such case, a surety for those sureties as well as for Barrett &

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Brown ; and as to him they are all principals. *Craythorne v. Swinburne*, 14 Ves. 160. Equity will restrain the creditor from proceeding against a surety until he has resorted to the principals and their securities in his hands. Theobald on Pr. & Surety, 256 ; *Cottin v. Blane*, 2 Anstr. 544 ; *Wright v. Nutt*, 3 Bro. C. C. 326 ; *Same v. Same*, 1 H. Bl. 136 ; *Wright v. Simpson*, 6 Ves. 728. And if the surety pays the debt, he has a right in equity to stand in the place of the creditor, as to all securities held or acquired by him. *Wright v. Morley*, 11 Ves. 12 ; Theob. on Pr. & Surety, 252.

It cannot be argued, that the plaintiff has received from the American Insurance Company one half of the sum insured by both companies. That company paid a sum of money into court, without specifying the particular items composing it. The plaintiff took out the sum so paid, as he had a clear right to do. *Malcolm v. Fullerton*, 2 T. R. 645 ; *Vaughan v. Barnes*, 2 Bos. & Pull. 392 ; *Le Grew v. Cooke*, 1 Bos. & Pull. 332. The sum paid into court was \$ 4345 28, which is about one quarter of the amount justly due to the plaintiff from the two companies ; for the Court cannot settle the disputed claims of the plaintiff and the American Insurance Company in this case.

The plaintiff claims the right to recover of the defendants the whole amount of the sum insured by them. Where there are several policies on the same insurable interest, the insured may elect from whom to claim payment ; and the underwriter who pays, may claim contribution from the others. 1 Phill. on Ins. 326, 327 ; 2 Phill. on Ins. 224 ; *Potter v. Marine Ins. Co.*, 2 Mason, 475 ; *Lucas v. Jefferson Ins. Co.*, 6 Cowen, 635.

Parsons and Stearns, for the defendants. As to the first position of the plaintiff, the parties to the policy agree that there shall be deducted from any loss payable under it, "all sums due to the company from the insured when such loss becomes due." The plaintiff, by agreement with the company, puts himself in the place of Barrett and Brown, *when the loss is payable*, taking the risk of any intermediate transactions entered into between them and the insurers in good faith and without the purpose of defrauding him.

It is said that the defendants have different securities, and that the Court will require, that the securities be so apportioned among the debts as justice may require. The defendants stand on their legal rights, they do not choose to substitute an inferior security for a more valuable one. The money in their own hands is the best possible security, and they therefore claim to deduct from this fund the whole amount due to them from Barrett & Brown. *Union Bank v. Laird*, 2 Wheaton, 390.

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The claim of the plaintiff is, substantially, that this Court exercise chancery powers in this case, as if all the parties in interest were brought before the Court by a bill of interpleader. Even if the Court had such powers, they could not safely be exercised here. But the Court have no such powers. *Dwight v. Pomeroy*, 17 Mass. R. 327.

The plaintiff is not a surety excepting so far as he becomes one by his interest in funds now in the hands of the defendants and subject to their lien for their demands against Barrett & Brown. In common parlance, a man holding this relation would hardly be called a surety ; and certainly this is not such a suretiship, as the principles and authorities referred to by the plaintiff contemplate.

The question in this case is not between *funds* and *sureties*, but between independent funds. The plaintiff, in fact, asks the Court to assume the peculiar chancery power of apportioning the various funds or securities among the various debts or claims, as may be equitable to all the parties in interest. We regard this as peculiarly a chancery power ; for, at law, the defendants may elect the fund out of which they will satisfy their debt. This is nothing more than the converse of the principle, that where a general payment is made, the creditor may, at any time, apply it to whichever of the debts due from the payer he may elect. *Mayor &c. of Alexandria v. Patten*, 4 Cranch, 317 ; *Guinn v. Whitaker*, 1 Har. & Johns. 754 ; *Smith v. Screven*, 1 M'Cord, 368 ; *Bacon v. Brown*, 1 Bibb. 334. But it is distinctly settled, that in chancery, a creditor may take and hold divers securities for his debt, and that he cannot be compelled to give up either of them until his whole debt is paid. *Union Bank v. Laird*, 2 Wheaton, 390.

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The plaintiff claims a right to demand the whole amount of the policy, of either of the two insurance companies, whose policies are simultaneous, because such is the strict rule of law. But the assured has no right to elect to take one half of his loss from one of the assurers, and then elect to take more than the other half from the other insurer. By taking half from either, he elects to divide his claim between them. The plaintiff, by taking the money paid into court by the American Insurance Company, has made his election to divide his claim between the two companies.

The defendants therefore suppose, that the plaintiff can recover from them only one half of the sum due by both companies on the Soule ; and that they are entitled to deduct from this half all the debts due to them from Barrett & Brown, including the whole amount lent on the barque Kent, with the accruing interest. This amount will be diminished by the loss payable on the Kent, if the Court shall think such diminution proper. It is to be understood, however, that the defendants do not admit this, but refer the question to the Court.

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SHAW C. J. delivered the opinion of the Court. It appears, in the present case, that two policies were made on property on board the brig Soule, from Boston to Antwerp, in behalf of Barrett & Brown, bearing date the same day, one by the defendants and one by the American Insurance Company, each for the sum of \$10,000. The property at risk amounted to the sum of \$17,185.19. Both policies therefore together exceeded the amount at risk, by nearly the sum of \$3000.

By the terms of both policies, they being in the form now in use in the city of Boston, it was stipulated that the policy should not be held to cover any risk already covered by a prior policy ; and that the policy, so far as it covered risks not already covered by any prior policy, should not be considered as in any respect affected by any subsequent policy. Had it appeared, therefore, by the facts in the present case, that the policy at the American Insurance Office was made prior to the present, this would, by force of the above clauses, have been available as a substantive contract of assurance for the amount of \$7185.19 only, being the balance of interest not covered

by the prior policy. Or had it appeared, that the policy at the American Insurance Office was taken after the present, this would have stood as an available insurance to its amount, \$10,000. And being of the same date, it would have been open to proof which was in fact executed first, so as to give effect to these clauses in the policies. But no such proof has been offered, and no fact is stated in the report from which any priority can be inferred; on the contrary, the two companies have agreed between themselves to consider and adjust them, as if made simultaneously, and we consider that the argument has proceeded on the same ground, without objection on the part of the plaintiff.

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Treating these policies then as in fact made at the same time, the clause in regard to priority is wholly inoperative, and then as to the amount of the difference between the sum insured and the sum at risk, it is the case of a double assurance, that is, the assured has an obligation from two or more parties to perform the same thing, at the same time. When this is the case, the party holding such double assurance, may in the outset, and before making any election, consider each debtor as liable to bear a proportionate part of the common burden, and recover accordingly; or he may require either of the parties liable, to pay the whole, and then it follows as a rule of law, founded upon the broadest principles of equity, that where one of two parties has paid the whole of a debt, for which each was originally and ultimately liable, the party who has paid the whole or a disproportionate part of the common debt, shall have a remedy against the other for a contribution, so that the burden may be borne equally according to their respective liabilities. In the present case, it appears, that the plaintiff is the assignee of both policies, that suits were commenced on both policies, and entered in court, by the plaintiff at the same time.* It further appears, that both the defendant companies claimed certain deductions by way of payment or set-off, that the American Insurance Office, in the suit against them, considering that they were liable for half the actual loss, and not contesting the right of the plaintiff to claim what was

* See *Wiggin v. American Insurance Company*, post, p. 158.

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actually due as between them and Barrett & Brown, the original party assured, but claiming certain deductions, made an estimate of the amount actually due, by charging themselves with one half of the actual loss, and making deductions to a certain amount, struck a balance, and paid into court the sum of \$4345.28, computed upon that basis ; and the plaintiff took the money out of court. The plaintiff being the assignee of both parties, it does not appear that it can make any difference to him, whether he elects to take one half of the amount which he is entitled to recover from each office, or \$10,000 from the one, and \$7000 from the other. Under the circumstances of the case, therefore, we consider the taking the money out of court, as *prima facie* evidence, that the plaintiff acceded to the proposal of the two companies to consider each as responsible for one half of the sum actually at risk, and made his election accordingly to adjust the loss in the present case upon that basis.

If it is otherwise, if there is any mistake on this point, which the plaintiff wishes to have more fully considered, judgment must be suspended until the parties can be further heard.

Considering then that the defendant company are liable on their policy for one half the amount at risk, say \$8592.59, with interest to be computed, then the material questions controverted between the parties arise, what sums the defendant company have a right to deduct, in order to ascertain the balance due. In the first place it is proper to consider the contract between the parties to this suit. Had it been a mere assignment in equity, the suit must have been commenced in the name of Barrett & Brown, and all equitable deductions would have been made. But besides the general rule of law, that an assignment of a chose in action cannot be made at law, so as to enable the assignee to sue in his own name, there is a clause in the policy, which prohibits the assured from assigning the policy without the consent of the underwriters. The consent of the defendant company in the present case was essential, to enable the plaintiff to maintain his action, and that being given upon terms, by his acceptance of it the plaintiff assents to and becomes bound by the terms. The policy was made in February, 1834, assigned to the plaintiff in June, 1834, and

he defendants assented to it by a memorandum in writing, "reserving to themselves all the rights expressed in the policy, regarding premium notes, debts, &c." The plaintiff, by assenting to these terms, agreed that all debts due to the office should be deducted from the amount due on this policy. The substantial effect of such an assignment under such a reservation is, that the defendants promise to pay the plaintiff the same amount, which but for the assignment would be payable to Barrett & Brown. The effect is nearly if not precisely the same as the assignment of a chose in action, without the express concurrence of the debtor, but with notice to him, which effect would be, that the assignee must sue in the name of the assignor, that all equitable payments, set-offs, and deductions, which the debtor might make as against the assignor, may be made, but that any release or discharge given by the assignor after notice of the assignment will not avail, and any debt contracted after such notice cannot be set off. By the particular terms of the reservation made by the defendants, in their assent to this assignment, we were at first rather inclined to the opinion, that small premium notes, taken in the ordinary course of business and in good faith, before any failure on the part of Barrett & Brown, might be deducted; but this applies only to two small notes subsequent to the assignment, one for \$158, dated September 1834, and one for \$1, dated October 1834, and as to these the question becomes wholly immaterial, upon the considerations hereafter stated.

The assignment then was made by the assured, with the assent of the defendant company, and accepted by the plaintiff, reserving all rights expressed in the policy regarding premium notes, debts, &c. By the terms of the policy, the defendants, on the happening of a loss, and in liquidating it, were to have a right to deduct from it, all premium notes and other debts due to the office. But, supposing that this reservation should be construed strictly, and be limited to all debts, which should become due, in virtue of contracts and engagements then entered into, and dealings then had, it appears by the statement of facts, that in virtue of two policies made prior to this assignment, there was a loss due from the defendant company to Barrett & Brown. On the liquidation of that loss, the defend-

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ants had a right, by the terms of the policies, to deduct all premium notes due to the office, as well those afterwards as those previously made. And neither the plaintiff nor any other person having had an assignment of those policies, there was nothing to interfere with the general right of the defendants, as against Barrett & Brown, to deduct their premium notes from that loss.

We consider then, that the effect of this assignment was to make the defendants liable to the plaintiff for any loss which might occur, on the policy on property shipped by the brig Soule to Antwerp, first deducting any premium notes or debts due to the office, in virtue of contracts then subsisting. But in order to ascertain what those debts are, we think the defendants are bound to give credit for all sums due to Barrett & Brown, growing out of the same dealings, and that the balance only is the debt due, and that the plaintiff is entitled to have those credits given to Barrett & Brown in order to reduce the debt, which by the reservation they have a right to deduct from the policy assigned to him.

It appears that there is due to Barrett & Brown, from the defendant company, the sum of \$4,995.05, for partial loss and general average on the Kent. From this sum is to be deducted notes Nos. 1 and 2, for premiums on the same policies; also the four other premium notes, because though given after the policies on the Kent, yet by the terms of those policies the defendants, on liquidation, were to deduct all premium notes, past and future, and there was no assignment to any third person to interfere with this general right.

The balance thus ascertained, of the loss due from the defendants to Barrett & Brown, is then to be deducted from the amount due to the defendants by Barrett & Brown on the bottomry bond.

This leads to the most important question in the cause, which is, whether the defendant company have a right to set off the amount due to them on the bottomry bond, against the claim of the plaintiff in this action, and the Court are all of opinion, that they have this right. This bottomry bond was dated, not only before the assignment, but before the policy now sued upon was made. It comes, therefore, within the

terms of the reservation. It was a debt due by Barrett & Brown, as principal debtors, to the defendants. The argument on the part of the plaintiff is, that the defendants had two other remedies for this sum, to which they should first have resorted, namely, the mortgage on the ship, and the sureties on the bond, who are proved to be solvent. But we think that these were mere collateral securities and remedies, to which the defendants might, but were not bound to resort. Where a creditor has a lien on two distinct funds, he may resort to either, although other persons may have subsequent claims, so that his election may benefit one in preference to another. A court of law will not oblige a creditor so to marshal his claims, as to charge one fund and release another, where both are liable. *Lupton v. Cutter*, 3 Pick. 298 ; *Union Bank v. Laird*, 2 Wheaton, 390. But this case stands somewhat stronger, than that of the right of a creditor to elect, among different securities, to which he will look. The plaintiff took this assignment subject to the debts due from Barrett & Brown to the office ; this was a debt due on a bond then existing, and which afterwards became payable ; and, therefore, by the terms of his assent to the assignment, the defendants had a right to deduct this debt, without first resorting either to the mortgage on the vessel, or to the sureties on the bond

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**TIMOTHY WIGGIN *versus* THE AMERICAN
INSURANCE COMPANY.**

Where an underwriter assented to an assignment of the policy, "reserving his rights expressed in the policy," and by the terms of the policy any loss was to "be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the underwriter from the insured when such loss becomes due, being first deducted," it was *held*, in an action by the assignee to recover a loss, that the underwriter was entitled to deduct the amount of premium notes given by the assignor for policies underwritten subsequently in the ordinary course of business, and without any fraudulent intent to defeat the assignment.

In the same action it was *held*, that the underwriter, having a claim against the assured on a bottomry bond, had a right to deduct the amount of his claim from the loss on the policy, and was not obliged to resort to the surety on the bond, though solvent, in relief of the assignee of the policy.

THIS was an action upon the policy mentioned in the preceding case, dated February 8th, 1834, whereby the defendants caused Barrett & Brown to be insured \$10,000, on coffee on board the brig Soule, at and from Boston to Antwerp.

The parties stated a case, in which it is agreed, that Barrett & Brown also procured a policy of the same date for the sum of \$10,000, on the same property, to be made by the Suffolk Insurance Company, (being the subject of the preceding case.)

The brig sailed from Boston to Antwerp on the 14th of February, 1834, with coffee on board belonging to Barrett & Brown, to the amount of \$17,185.19, and has never since been heard of.

Barrett & Brown made the following indorsement on the policy underwritten by the American Insurance Company :—" Boston, June 23d, 1834. Pay the within, in case of loss, for value received, to Timothy Wiggin, Esquire, London ;" and upon the presentation of the policy thus indorsed to the officers of the insurance company, they subjoined the following words :—" The company hereby agree to the above assignment and order to pay in case of loss, reserving their rights expressed in the policy."

The policy contains this clause :—" In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted."

It is admitted by the plaintiff, that both of the insurance companies are solvent ; and it has been agreed, as well between the companies, as between the plaintiff and the defendants in this suit, that the two policies shall be considered to have been executed simultaneously.

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Prior to the making of the policies, viz. on the 17th of September, 1833, the defendants had lent to Barrett & Brown the sum of \$7,000, for one year, on bottomry upon the brig Tim. In consequence of the non-payment of the bottomry bond the brig was taken possession of by the defendants, and was sold by public auction in April, 1835 ; and the net proceeds, amounting to \$4,861, were appropriated in part payment of the bond.

The defendants also hold seven premium notes against Barrett & Brown, three of them made before, and four of them after, the assignment of the policy to the plaintiff.

The defendants contend, that the plaintiff is not entitled to recover against them more than a moiety of the amount of Barrett & Brown's actual loss of coffee on board the Soule, and that from that moiety should be deducted the balance due on the bottomry bond and the amount due on the seven premium notes ; and on the 7th of July, 1835, they paid to the plaintiff accordingly the sum of \$4,345.28, under an agreement that it should have the same effect as if paid into court upon the common rule.

It is admitted by the defendants, that this suit is defended at the expense of John Dorr, the surety on the bottomry bond, but he has not made any stipulation to waive any defence which he may have against the defendants' claim on the bond if the plaintiff should prevail in this suit. It is also admitted that Dorr is solvent.

The parties agree that a nonsuit or default shall be entered, according to the opinion of the Court.

C. P. Curtis and *B. R. Curtis*, for the plaintiff. The premium notes taken by the defendants subsequently to the assignment to the plaintiff, cannot be set off in this action, for the rights reserved by the defendants could not be understood to include a right to absorb the whole amount of the policy by new credits to the assignors. *Jenkins v. Brewster*, 14 Mass. R. 291 ; *Sargent v. Southgate*, 5 Pick. 320.

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In regard to the bottomry bond this case differs from the suit against the Suffolk Insurance Company, because it is defended for the benefit of a surety on the bond. If the sum due on the bond is deducted from the plaintiff's claim, and if Barrett & Brown were solvent, the plaintiff would call on them to reimburse what he thus applies to their use ; and Dorr must stand on the same footing with those for whom he is surety, and is not to be relieved by the plaintiff. If the plaintiff is considered as a surety for the sum due on the bond, he is a surety subsequent to Dorr, and in case his money shall be applied to the bond, he will stand in the place of the defendants, and will have a remedy over against the parties to the bond. To avoid circuity of action, therefore, the defendants will not be allowed to set off the sum due on the bond against the plaintiff's loss on the policy. Theobald on Pr. and Surety, 266, 269, 270, 252 ; *Craythorne v. Swinburne*, 14 Ves. 160 ; Story on Equity, § 498, 499 ; *Wright v. Morley*, 11 Ves. 12.

Sprague, W. J. Hubbard and Watts, contra. The defendants place their claim of set-off upon the ground of a special contract, by which " their rights, as expressed in the policy," were reserved. It was a source of profit to them to insure for Barrett & Brown, and the parties contemplated that they would continue to make insurance as before. The defendants received no consideration for giving up the security which this policy afforded them for future, as well as present demands against the assured. We admit that in giving further credit to Barrett & Brown, the defendants must act *bonâ fide*, and not for the purpose of defeating the assignment to the plaintiff.

The defendants are bound to deduct from the loss on this policy the sum due on the bottomry bond, for otherwise they would discharge their claim against Dorr. They have no right to look to the surety when they have in their hands a fund belonging to the principal. Story on Equity, § 323 *et seq.* ; *Capel v. Butler*, 2 Sim. & Stuart, 457 ; *Mayhew v. Crickett*, 2 Swanst. 185 ; *Law v. East India Co.* 4 Ves. 824 ; 2 Hovenden on Frauds, 175 ; *Baker v. Briggs*, 8 Pick. 128, and authorities there cited.

March 13th,
1837.

*Per Curiam.** Generally, in the case of an assignment of

* *Shaw C. J.* did not sit in this case.

he chose in action, a new demand against the assignor, arising after notice of the assignment has been given to the debtor, cannot be set up against the assignee. But in this case the defendants assented to the transfer of the policy only upon a reservation of "their rights expressed in the policy." They wanted security as well for future, as for present claims against Barrett & Brown. The terms of the reservation are general; the plaintiff took the assignment subject to them; and he cannot avoid their operation except by proving fraud. He stands as Barrett & Brown would have done had there been no assignment, and as against them the defendants would have had a right to deduct from the loss the sums due on all the premium notes and on the bottomry bond.

The plaintiff argues, in respect to the bond, that the defendants have a right of action against Dorr, the surety; that if the sum due on it shall be deducted from the loss on this policy, the plaintiff will stand in their place and be entitled to recover the same sum from Dorr; and that, therefore, in order to avoid circuitry of action, the deduction ought not to be permitted. But this ground is untenable, for the plaintiff could not sue Dorr in an action at law on the principle of substitution; which is a doctrine of a court of equity. The defendants may lawfully say that they will not stand between the plaintiff and Dorr, but will assert their rights against the plaintiff.

JOSEPH TUCKER *et ux. versus* The City of Boston

A testatrix, after bequeathing to the children of two of her sons substantial or nominal pecuniary legacies, and one cent to M. G., daughter of her daughter R., devised as follows : " I also give and bequeath unto E., daughter of my son J., and also to G. &c. children of my son G., " and also to the children and heirs of my daughter M. S., and also to P., A. and children of E., which said P., A. and E. were children of my daughter R., an equal share of my property, that shall or may remain, &c. meaning that the child or children of each of my sons or daughters shall have that portion which would fall to their respective parents, as above described." It was held, that the legal effect of this will was to distribute the residue among the issue, excepting M. G., of those of her children who are mentioned in the residuary devise, *per stirpes* ; and that a child of R., who was not named, was entitled to a proportionate share, as being included in the general description in such residuary devise.

Under St. 1788, c. 24, § 8, which provides, that a child or grandchild, not having a legacy given him in the will of his parent or grandparent, shall have his proportion of the estate of the testator assigned to him, the presumption is, if the child has no legacy, that he was unintentionally overlooked ; and to prevent the operation of the statute, this presumption must be rebutted by evidence from other parts of the will.

Where the grandchildren of a testatrix were very numerous, the relations complicated, and the testatrix advanced in years, and every grandchild, except one granddaughter, either by particular or general description, had a nominal or a substantial provision, it was held, that such granddaughter was entitled to a share under the statute, although her mother was named in the will

WRIT of entry to recover the possession of one undivided sixteenth part of certain land, claimed by the demandants in the right of the wife, Rebecca Tucker, as one of the devisees or heirs at law of Catharine Stevens.

The parties stated a case.

Catherine Stevens died in 1825, seised of the premises in fee simple ; and her will, which was dated June 29th, 1818, contained the following clauses : " I will and bequeath unto George Stevens, Elizabeth Joy and Mary Ann Hitchborn, children of my son Peter Stevens, the following sums of money, to wit, to said George, one hundred dollars, to Elizabeth Joy, the sum of fifty dollars, and to Mary Ann Hitchborn, the sum of one cent. I also give and bequeath unto the children and heirs of my son Henry, the sum of one cent each. Also I give unto Mary Gear, daughter of my daughter Rebecca Sancry, the sum of one cent. I also give and bequeath unto Elizabeth Andrews, daughter of my son John Stevens,

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and also to George Stevens, Mary Jones and John Stevens, children of my son George Stevens, and also to Rebecca Andrews, Ann Proctor, Isabella Newell and Lucretia Stevens, children of my son Joseph Stevens, and also to the children and heirs of my daughter Mary Shoult, and also to Peter Sancry, Ann Wiswell and children of Elizabeth Tucker, which said Peter, Ann and Elizabeth were children of my daughter Rebecca, an equal share of my property, that shall or may remain after the several legacies before mentioned as well as those hereafter to be named, shall be paid out, meaning, that the child or children of each of my sons or daughters shall have that portion which would fall to their respective parents, as above described."

Rebecca Sancry, the daughter of the testatrix, died before her mother, having had six children, Mary, Peter, Ann and Elizabeth, who are named in the will, Abraham, who died without issue, before the will was executed, and Rebecca Tucker, the plaintiff. Mary died before the decease of the testatrix, without issue. Elizabeth and Ann died before the testatrix, but left issue who were living at her death. Peter survived the testatrix.

The demandants entered upon the premises on August 4th, 1835. The tenants held under a deed from James Hendley, dated May 21st, 1835.

If the Court should be of opinion, that the demandants were entitled to recover, the tenants were to be defaulted, and judgment to be rendered in favor of the demandants for their undivided portion of the premises.

The case was argued in writing.

C. P. and *B. R. Curtis*, for the demandants. There are several leading objects to be attended to in ascertaining the meaning of this will. 1. The testatrix intended to give the residue of her estate to her grandchildren and not to her children. 2. She intended that her grandchildren should take *per stirpes* and not *per capita*. 3. She intended to disinherit Mary Gear and the children of her son Henry, and to provide in some other way for the children of her son Peter. When, therefore, she says, "the child or children of *each* of my sons and daughters shall have that portion which would fall to their

Tucker respective parents, *as above described*," she means, each of her sons and daughters whose child or children she had not *disinherited* or *provided for in some other way*. Keeping in view all these objects of the testatrix, her intentions seem to have been to pass over her sons Peter and Henry and their children, in the distribution of the residue, and to give to the children of each of her other sons and daughters, such a portion as their respective parents would have inherited, at her decease, supposing Peter and Henry and their children were not in existence. If this be the true construction, then the plaintiff, Rebecca Tucker, would be entitled to a share under the will.

But we shall be here met with the objection, that in naming the children of her daughter Rebecca, who are to be the objects of her bounty, the testatrix does not name Rebecca Tucker. There are several answers. It is a well settled rule, that where it appears to have been the intention of a testator to make *a class of persons* the objects of his bounty, and in naming them he omits one of the class, the one omitted will still take. *Humphreys v. Humphreys*, 2 Cox's Eq. Cas. 184; *Garth v. Meyrick*, 1 Bro. C. C. 130; *Tompkins v. Tompkins*, cited in 2 Ves. sen. 564, 3 Atk. 257, and 19 Ves. 126; *Scott v. Tenoulhet*, 1 Cox's Eq. Cas. 79; *Stebbing v. Walkey*, 2 Bro. C. C. 85; *Garvey v. Hibbert*, 19 Ves. 125. Here is a sufficient description of the class to which Rebecca Tucker belongs; and there is nothing in the will to show, that the testatrix did not intend that she should be included in the class. Where she does not intend that a grandchild shall be embraced in a class, she excludes in terms, as in the case of Mary Gear.

But if Rebecca Tucker is not entitled under the will, then she will take by virtue of *St. 1783, c. 24, § 8*, on the ground that she was unintentionally omitted in the will. The mischief to be remedied by the statute was, that a testator sometimes unintentionally omitted to make provision for a child or grandchild. The remedy provided for this mischief was, that the testator should show, that he had not forgotten his child or grandchild, *by giving him a legacy*. It is not sufficient for the court to be satisfied that a testator has not

forgotten a child ; they must be satisfied by *legal evidence* ; and the only legal evidence is a legacy in the will. Courts in England as well as in this country, have, of late years, often lamented the departure from the natural construction of the language of statutes, and have, as far as possible, returned to such a construction. *Rex v. Ramsgate*, 6 Barn. & Cressw. 712 ; *Rex v. Stoke Damerel*, 7 ibid. 569 ; *Rex v. Barham*, 8 ibid. 101 ; *Noitley v. Buck*, 8 ibid. 164.

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Whatever may be the true construction of the statute, it is manifest, that the person who drew up this will, and the testatrix, supposed that a child or grandchild could be disinherited only by giving him a legacy. It cannot be said then, that she intended to exclude Rebecca Tucker, when she has not shown that intention in the mode which she thought the law required, and which she has adopted in all other cases.

J. Pickering, City Solicitor, for the tenants. The demandant, Rebecca Tucker, is not entitled under the will. It is said, that she is to be deemed a devisee, because she is one of a "class" of persons provided for by the will. If it should be admitted, that the intention of the testatrix was to give her estate to her grandchildren, exclusively of her children, and that the grandchildren were to take *per stirpes* and not *per capita*, still the words of the will must be construed with this qualification, that those grandchildren, who are to take at all, shall take *per stirpes*. This construction of the clause is established by the concluding words of it, declaring that the grandchildren shall take "that portion which would fall to their respective parents, *as above described*." Under this view of the clause it is a *non sequitur* to conclude that Rebecca Tucker is entitled because she was a child of one of the daughters of the testatrix. She must have been *such a child* as the testatrix intended should come in for a share of the estate. The tenants, therefore, still contend, that it is a valid objection to the demandant's claim, that Rebecca Tucker is not named in the will.

Nether is she entitled, under *St. 1783, c. 24, § 8*, to claim on the ground that she was unintentionally omitted in the will. *Terry v. Foster*, 1 Mass. R. 146 ; *Wild v. Brewer*, 2 Mass. R. 570 ; *Church v. Crocker*, 3 Mass. R. 17 ; *Wilder v. Goss*,

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14 Mass. R. 357 ; *Merrill v. Sanborn*, 2 N. Hamp R. 499.

SHAW C. J. delivered the opinion of the Court. The decision of this case must depend upon the construction of the will of Catharine Stevens. This is an extremely obscure will, and it is difficult to put a construction upon it intelligible or satisfactory. The Court are of opinion, however, that it was the intent and legal effect of this will of the testatrix, having provided for the descendants of two of her seven children by pecuniary legacies, beneficial or nominal, to distribute the residue among the children and issue of the other five, except those whom she had excluded, as in the case of Mary Gear, to take *per stirpes* and not *per capita*. The plaintiff, Rebecca Tucker, was one of the six children of Rebecca Sancry, a daughter of the testatrix. Abraham died long before the will was made, and Mary Gear was excluded by a nominal legacy ; two others and the children of a third are named, but the plaintiff is not named among them who are to take the residue. She then adds, "meaning that the child or children of each of my sons or daughters shall have that portion which would fall to their respective parents." The primary intent of this clause was to direct that they should take *per stirpes*, but the terms are broad enough to include the plaintiff as one of the children of one of those to whom the residue was intended to be given, and she is not otherwise excluded. In all other instances, those coming within the description of the children of those branches, among which the estate was intended to go, are excluded by a nominal legacy, if intended to be excluded. It is very clear, that a legatee need not be named ; any description or designation is sufficient, which will include or identify her. In this same will, the children and heirs of the daughter Mary Shoult are included under that general designation.

2. But upon the other point, the Court are of opinion, that if the plaintiff, the granddaughter, Rebecca Tucker, did not take a share of the estate, under the clause devising the residue, she would take a share by descent under the provisions of the St. 1783, c. 24, § 8, as a grandchild, the daughter of a deceased child, to whom no legacy was given.

The Court do not mean to question the authority of the

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decisions which have held, as the reasonable and true construction of this statute, that it is not to be construed literally, but if it appear, that the child or grandchild was fully in the mind of the testator, and was not unintentionally overlooked or forgotten, the statute should not apply. Whatever we might have thought, if now first called on to expound the statute, the construction has been too long and uniformly adopted and settled as a rule of property, to be safely overturned.*

But the tests given in the cases cited, to determine whether a child has been overlooked and forgotten, or intentionally omitted, are not conclusive. They affirm the general principle, but each case must depend much on its own circumstances. In general, if a child has no legacy, the presumption is, that such child was unintentionally overlooked; and to prevent the operation of the statute this presumption must be rebutted by evidence from other parts of the will. The most conclusive would be a declaration of the testator, that for any cause it was his intention not to give any thing to the child; but any other evidence, which would lead to the same conclusion, must have the same effect. The circumstance relied on here is, that the plaintiff's mother was named, which, it was contended, brings it within the case of *Wilder v. Goss*, 14 Mass. R. 357. This is a circumstance to be considered, but under the other circumstances of the present case, a slight one, the descendants being very numerous, and the relations complicated, and the testatrix advanced in years. Besides, wherever she intended to exclude one from a beneficial enjoyment of her estate, she did it by giving him a legacy, and in every instance, either by particular or general description, every descendant has a provision, nominal or substantial, except the demandant. On the whole, the Court are of opinion, that there is no evidence to rebut the presumption, that if the demandant was not included as one of those who were to take a share in the residue, she was unintentionally overlooked and forgotten by her grandmother, and in that event would take a share under the statute, as of an intestate estate.

Tenants defaulted.

* This construction is now adopted by statute, as a modification of the positive rule of law. Revised Stat. c. 62, § 21.

GEORGE R. GARDNER *et al. versus* FREDERICK HUEG
and Trustees.

The *lay* or share in the profits of the voyage, which a seaman in a whaling ship receives, according to a custom, in lieu of wages, is assignable before the commencement of such voyage.

Where a seaman, in a whaling ship, by his deed purporting to be for the consideration of \$ 800, assigned his *lay* before the commencement of the voyage, but the assignee paid him no money at the time, but agreed to advance money for his use before and during the voyage, and made advances accordingly, and upon the assignor's return rendered him an account thereof, in which he was credited with the sum of \$ 800 for his *lay*, with which account he was satisfied, it was *held*, that such assignment was valid as against the plaintiff, a creditor of such seaman at the time of the assignment, although no notice of the assignment had been given to the owners of the vessel, until after the termination of the voyage, and just before such *lay* was attached in their hands by the plaintiff.

THE answer of Daniel Jones, one of the supposed trustees, set forth, that he was the agent of the owners of the whaling ship Spartan, the supposed trustees, and was also a part-owner; that the defendant was the cooper of the ship, and performed a voyage in her; that his share or *lay*, which was one forty-fifth, amounted to \$ 1185.11; and that advances were made to the defendant by the owners, amounting to \$ 712.50. The answer then discloses an assignment under seal, by the defendant, of the whole of his *lay*, to Thomas Coffin.

By this assignment, which was dated November 19th, 1831, the defendant, in consideration of the sum of \$ 800, assigned and transferred to Coffin the whole of the voyage, share or *lay*, which the defendant should obtain as cooper and mariner of the Spartan during her intended voyage, to be paid to such assignee at the termination of the voyage, covenanted with the assignee that he should receive all which the assignor might obtain, and requested the captain, agent, and owners, to deliver his voyage to the assignee upon the arrival of the ship.

The assignee came in, under the statute, to support the assignment, and claimed the balance in the hands of the supposed trustees. The plaintiff denied the validity of the assignment upon two grounds 1. That an assignment of the whole of a seaman's future earnings was void as against public policy; and, 2. That the assignment in question being intended, and

having a tendency to defeat, defraud, and delay the creditors of the assignor, was void as against the plaintiffs, who were creditors before the assignment was made.

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At the trial, before *Shaw C. J.*, it appeared, that no money was paid to the defendant by the assignee at the time when the assignment was made, but that the assignee agreed to let him have some money before he sailed, and to supply his family during his absence; that this was done by the assignee; that after the defendant's return an account was rendered to him by the assignee, in which the defendant was credited with the sum of \$800 for his lay, and charged with various advances and supplies, with which account he was satisfied; that the assignee did not communicate this assignment to the owners, or apply to them to accept it, till after the return of the ship, and but a short time before the trustee process was served.

Judgment was to be entered according as the Court should be of opinion, that the trustees ought to be charged or discharged.

The case was argued in writing.

Eddy and *Warren*, for the plaintiffs. We contend, that the contract between the assignee and the defendant was a void contract at the time, that it could not be enforced, on the consummation of the voyage, against any person except the defendant, (if against him,) and that the assignee could not, by virtue of it, claim the lay against the owners of the vessel, nor against the creditors of the defendant. The contract was void as against public policy and the well established principles of the common law. *Com. Dig. Assignment, C 3*, and *Grant, D*; *Perk. Grant*, 65; *Flarty v. Odlum*, 3 T. R. 681; *Lidderdale v. Montrose*, 4 T. R. 248; *Cooper v. Reilly*, 1 Russ. & Mylne, 560.

If this assignment had been assented to by the owners, the case would be very different. It would then come within the spirit of the decisions in *Fitch v. Fitch*, 8 Pick. 480; *Clark v. Adair*, cited in *Master v. Miller*, 4 T. R. 343; *Cutts v. Perkins*, 12 Mass. R. 206; *Crocker v. Whitney*, 10 Mass. R. 319.

In the present case, the defendant had agreed to perform this voyage, and to have a certain portion of the earnings of the

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vessel. This manner of rewarding the seaman is very important to the owners. It is essentially necessary to the prosperity of these enterprises, that all the seamen should have an interest in the success of the voyage. The ardor, enterprise, promptitude, and diligence, which are requisite to success, could not be secured by *mere wages*. It is, therefore, a fraud upon the owners, for a stranger to step in secretly and agree with a seaman to give him wages, or a sum certain, instead of his lay. So it would be injurious to the interests of creditors, if debtors might make assignments of the avails of their future labor.

T. G. Coffin, for the trustees.

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PUTNAM J. delivered the opinion of the Court. There is a sufficient subject to which the contract was to attach. It is a chose in action, always assignable in equity for good consideration, and courts of law at this day protect the rights of the assignee. He may sue in the name of the assignor, and if the assignor discharge the debtor who has notice of the assignment, it shall not prejudice the claim of the assignee. The possibility of a term is assignable upon good consideration. *Theobald v. Duffay*, (in House of Lords, March 1729–30.) 1 P. Wms. 574, note. It is analogous to the *spei emptio*; the draught of the net, which by the civil law might be assigned. *Macomber v. Parker*, 14 Pick. 505. The assignor had, by the shipping articles, an inchoate right to a distributive share of the oil upon the making up the account at the end of the voyage; and we think it was a subject matter for a valid sale, notwithstanding it was a thing which existed in expectation, and not in *esse*, at the time.

We doubt very much the expediency of such sales or assignments; for so far as the ultimate success of the voyage is concerned, it is very clear, that if *all* the seamen were to have neither more nor less at the end of it, or in other words, if the compensation were not according to the amount to be divided at the winding up of the voyage, the great stimulus to individual exertion would be removed. And it is upon that principle, that the seaman is not permitted by law to insure his wages. There may, on the other hand, be some reasons of convenience almost amounting to necessity, which call for such an arrangement. However this may be, until the legislature shall

make some regulations upon this matter, the Court, we think, ought not to interfere on the ground of public policy.

By *St. 1 Geo. 2, c. 14, § 7*, every bargain, sale, bill of sale, contract, and agreement whatever, of, for, or concerning any pay, wages, or allowance due or to grow due to any seaman or seamen in the *service of His Majesty*, for such service, is declared void and of no effect. *Com. Dig. Chancery, 2 H.* About twenty years before that statute it was held, in *Crouch v. Martin*, 2 Vern. 595, that the assignment of wages by a seaman was a valid contract. The *St. 1 Geo. 2*, before cited, regulated this subject so far only as it concerned His Majesty's service, and did not alter the law as before held, touching the merchant service. And by *St. 20 Geo. 2, c. 24*, bills of sale of prizes before condemnation, are declared void. *Morrough v. Comyns*, 1 Wils. 213.

The half pay of officers is not assignable for reasons of public policy. Such emoluments are granted for the dignity of the state and for the support of the officers. *Flarty v. Odum*, 3 T. R. 682.

The question of fraudulent intent was waived by the parties, except so far as it might be the conclusion of law upon the facts found. And we all think that no legal inference of fraud can be made from the facts which are in the case.

When the assignment was made there was a promise on the part of the assignee to advance money to the assignor before he sailed, and to make supplies to his family, which promise was fulfilled, and the transaction was according to the known usage at Nantucket; which we cannot say is illegal, though we doubt somewhat of its expediency; and notice of the assignment was given to the owners before the trustee process was served.

Upon the whole, we are all of opinion that the assignment was valid, and that the trustees must be discharged.

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GEORGE BROWN *versus* HENRY M. PINKHAM

In a deed of a parcel of land in which were a well and pump, an interlineation of the words "with pump and well of water," after the description of the land by metes and bounds, was *held* to be an immaterial alteration, as the effect of the deed would be the same without those words.

If the plaintiff in *trespass quare clausum* shows no title to the *locus in quo*, he cannot object that a deed under which the defendant claims title and holds possession, is invalid.

TRESPASS quare clausum. Plea, the general issue. Trial before Shaw C. J.

The place in controversy was a small parcel of land, of about twelve feet square, with a well in it, and the alleged trespass consisted in taking a pump from the well.

There was evidence tending to show, that both parties had exercised acts of ownership, especially in and over the well.

The plaintiff gave in evidence several deeds, by which he derived title from one Simeon Ellis. Among other particulars in the description of the land thus conveyed, being fourteen rods, it was described as land for many years improved by Simeon Ellis, as a garden. It was contended by the defendant, that the *locus in quo* was a yard separate from the garden and appurtenant to the house, and did not pass under the description of *garden*. There was evidence tending to show that the land claimed by the plaintiff and the house occupied by the defendant, were formerly and before the first conveyance under which the plaintiff claims, occupied by Ellis, and that the *locus* was then enclosed by a fence on three sides, and by the house on the fourth, and that it was annexed to and occupied with the house, and was separated and detached from the garden.

The defendant opened his case by stating a title to the house and to the *locus*, by a deed from Ellis to the town of Nantucket, and another from the town to the defendant. The description in the deed from Ellis to the town was, "a parcel of land bounded on the east by a lane or court, on the south by Henry M. Pinkham's land, west by George Brown's land, north by land sold by Simeon Ellis to George Mantor, with all buildings thereon, and the pump and well of water, and all privileges pertaining to the same." It was objected by the plaintiff, that the words "*and the pump and well of water.*" were interlined,

and it was proposed to show that they were interlined after the deed had been executed. But it was ruled, that if the well and pump had not passed to the plaintiff by the prior deed of the garden, they remained annexed to the house and would pass with the house as appurtenant, and that the words in question would not change the effect of the deed. If this deed should be considered material to support the verdict, and this decision was incorrect, the verdict (which was in favor of the defendant) was to be set aside.

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The deed from the town to Pinkham, purported to be executed by the overseers of the poor, under an authority from the town, and the defendants were called on for proof of the authority; but it was ruled, that without such proof this deed, connected with evidence that the defendant had entered under it, and that it was recorded in the registry of deeds, was competent evidence for the purpose for which it was offered; that as the title of the defendant had never been called in question by the town, or any person claiming under the town, and as the plaintiff did not claim under the town, the deed purporting to be given by a committee of the town, duly registered, was such *prima facie* title as would qualify the defendant's claim of possession and enable him to defend his possession against a mere stranger, and that the plaintiff would be a mere stranger without some proof of title; and therefore this deed was sufficient to put the plaintiff upon his proof of title, which was the only purpose for which it was offered. If this deed was not competent evidence, without proof of the authority of the committee who executed it, or if certain evidence produced was not sufficient proof of such authority, the verdict was to be set aside.

T. G. Coffin, for the plaintiff.

Eddy and Bunker, for the defendant.

PUTNAM J. delivered the opinion of the Court. We are all satisfied that the ruling of the chief justice was correct. Where there has been a mixed possession, the party who proves a title shall prevail. The question was whether the *locus in quo* was part and parcel of the land conveyed by Simeon Ellis to the grantee under whom the plaintiff claims. It was described as a garden. It was proved that Ellis owned and occupied the land which the plaintiff bought; and likewise the

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estate claimed by defendant, which consisted of a house and land conveyed by Ellis to the town of Nantucket, and by the town to the defendant. And the jury, as we understand from the report of the judge and the argument for the defendant, found that the garden which the plaintiff bought did not contain the *locus*, but that this place was appurtenant to the house and conveyed by Ellis to the town, and by the town to the defendant.

The plaintiff has no right to meddle with the conveyancing between Ellis and the town, and between the town and the defendant. If there were any errors or interlineations which might affect the parties to the conveyancing, they and they only, and not strangers, are at liberty to question them.

But we are entirely satisfied, that the supposed interlineation of the words "with the pump and well of water," in the deed from Ellis to the town, was an immaterial alteration. For the land was sufficiently described by metes and bounds. The *locus* was occupied with the house ; it was inclosed by a fence on three sides and by the house on the other side ; and by operation of law the deed passed all the buildings upon it and all the works below the surface, unless it contained some exception which would take the subject matter excepted out of the legal operation of the deed. No such exception is made. It was, therefore, perfectly immaterial to interline the words about the well ; as it would have been to have interlined words about a shed, or out-house, which stood upon the granted premises.

Besides, the plaintiff (as before intimated) does not claim any part of the land embraced in the deed under which the defendant claims. And the town makes no objection against the defendant's right to the estate. The town is content that the defendant should occupy as he has done ; and it is merely gratuitous for the plaintiff to interfere in a matter in which he has no concern, and to prove that as between the town and the defendant there has been something added to the conveyancing between them, which would materially affect it. It is not the plaintiff's affair. He must be contented to keep all that his deed conveys to him. He is to have the garden, and leave the defendant to have the rest of the estate.

The judgment is to be for the defendant, according to the verdict

NEWELL STURTEVANT *versus* ALEXANDER H.
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Where a writ of *scire facias* against a trustee has been lost, the plaintiff may be permitted to file a copy as a substitute.

And if an office copy cannot be obtained for that purpose, the next best evidence is admissible : thus, where the plaintiff's attorney stated, in his affidavit, that he had made out a paper, partly from a *scire facias* against another trustee in the original suit, and partly from memory, and that he believed it was either an exact copy or substantially a copy of the lost writ, it was *held*, that leave of court to file such a paper as a substitute, might rightfully be granted.

After the defendant in a *scire facias* has appeared and answered to the writ, it is too late for him to object that it did not designate any time and place for his appearance.

The circumstance that, by a contract between the principal defendant and one summoned as his trustee, money due from the latter to the former is payable in another State, does not prevent it from being liable to attachment on the trustee process.

Where a person owing money to the defendant, paid it over, without any authority, to a creditor of the defendant, and was then summoned as trustee of the defendant, and the defendant afterwards ratified the payment, it was *held*, that the ratification was ineffectual, and that the party summoned was chargeable as trustee.

SCIRE FACIAS against Robinson, as trustee of William M. Hussey. Robinson had been defaulted in the original action.

At the Court of Common Pleas for Nantucket, June term 1835, judgment was rendered for the plaintiff against the defendant (Robinson,) on the *scire facias*, and the defendant appealed to this Court.

At the same term of the Common Pleas exceptions were filed by the defendant and allowed.

The bill of exceptions stated, that the plaintiff moved for leave to file a new writ of *scire facias*, the original *scire facias* having been mislaid ; and that this motion was accompanied by the affidavits of Charles K. Whitman and Benjamin Gardner, which were to be referred to as a part of the bill of exceptions. The affidavit of Whitman, which was written on the back of the new writ proposed to be filed, set forth, that he made the writ of *scire facias* which was lost, that at the same time he made a writ in the case of Newell Sturtevant against George B. Upton, which was a *scire facias* founded upon the same original action, and that by means of that writ and his own memory he had made out the within writ, which he believed to be either an exact copy of the lost writ or substan-

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tially a copy. The affidavit of Gardner, late clerk of the courts for the county of Nantucket, stated, that when he was clerk he made diligent search among the files of the Court of Common Pleas for a writ of *scire facias* of Sturtevant against Robinson, but did not find it.

The Court of Common Pleas, (*Strong J.* presiding,) on the ground that this was a judicial writ, and not an original writ, allowed the plaintiff's motion, and the new writ was filed accordingly ; and it was to this decision that the defendant filed his exceptions.

The new writ, according to a certified copy produced by the defendant, was dated the *tenth* of September, eighteen hundred and thirty *five*, and it set forth, that at the Court of Common Pleas held at Nantucket on the first Monday of June, 1834, Sturtevant recovered judgment for the sum of \$89.62 damage, and \$11.68 costs of suit, against the goods and effects of Hussey in the hands of Robinson as agent and trustee of Hussey ; that Sturtevant, on the 6th of "June last past," took out an execution upon the judgment ; that on the same day the execution was delivered to the sheriff, who on the same day required Robinson to expose and subject the goods, effects and credits of Hussey in his hands, to be taken in execution for the satisfaction of the judgment, and that Robinson refused to turn out any except the sum of ten cents, whereupon the sheriff returned *nulla bona* of Hussey in his precinct or in the hands of Robinson, except ten cents ; and the writ commanded the sheriff or his deputy to make known to Robinson, that he appear before the Court of Common Pleas, (not naming any time and place when and where the court was to be held,) and show cause why judgment should not be entered against him *de bonis propriis*, for the amount of the judgment.

The plaintiff subsequently produced another certified copy of the new writ, according to which the writ was dated the *thirteenth* of September eighteen hundred and thirty *four*, but it did not state any time or place for the sitting of the court at which Robinson was required to appear. The officer's return (according to a certified copy) stated that he served the *scire facias* on the defendant, on the 22d of September, eighteen hundred and thirty *four*.

By certified copies of the return on the original writ, which was against Hussey as principal defendant, and Robinson and George B. Upton as trustees, it appeared that Upton was summoned at 11 A. M., and Robinson at 12 M., on the 28th of April, 1834. The clerk also certified, that judgment was rendered for the plaintiff, in the Court of Common Pleas, at the term held at Nantucket on the first Monday of June, 1834 ; and that the execution was issued on the 6th of the same June, and was returned on the 11th, satisfied in part, to wit, by ten cents received of Upton and ten cents received of Robinson.

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At the October term, 1834, of the Court of Common Pleas for Nantucket, to which the *scire facias* was returned, Robinson filed his answers, in which he disclosed, that he had ten barrels of oil belonging to Hussey ; that on Saturday, the 26th of April, 1834, Hussey proposed to him to purchase the oil, and gave him a bill of parcels receipted ; that the respondent was to pay him the money in New York ; and that on Monday the 28th, between 11 and 12 o'clock, he paid for it by giving his negotiable note to Upton for the price ; that he paid Upton, because Hussey was indebted to Upton in a considerable amount ; and that the payment was made without Hussey's consent at the time, but that he had since ratified it.

The case was argued in writing.

C. P. Curtis and *B. R. Curtis*, for the defendant, contended that the Court of Common Pleas erred in permitting the paper to be filed as and for the writ of *scire facias*, because from the manifold errors in it, it did not appear to be even a substantial copy, much less a true and exact copy.

The supposed copy does not contain any statement of the time and place of holding the Court, to which the defendant is summoned to appear. Probably the original did contain them, because the sheriff returns that he has summoned the defendant to appear "at the time and place *within* mentioned."

Is there any precedent for such an act of filing a substantial copy ? Does it not make the attorney the judge of what is substantial and what is form ? *Petrie v. Benfield*, 3 T. R. 476.

The defendant objects to the admission of the papers lately obtained by the plaintiff and purporting to be copies of the writ, &c. There seems to be no reason for presuming them

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to be more exact copies of the original record, than those furnished to the Court by the clerk.

The trustee is entitled to his discharge ; 1. Because his contract was not to pay the debt at Nantucket, but at New York. He cannot be compelled to pay it elsewhere than where he contracted to pay it. *Jewett v. Bacon*, 6 Mass. R. 60 ; *Kidder v. Packard*, 13 Mass. R. 80. — 2. Because he has discharged the debt by payment to Upton. Hussey's ratification was equivalent to a previous authority. *Cushman v. Loker*, 2 Mass. R. 106 ; *Maclean v. Dunn*, 4 Bingh. 722. The intervening attachment will not prevent the effect of the ratification. *Pratt v. Putnam*, 13 Mass. R. 361 ; *Beals v. Allen*, 18 Johns. R. 367 ; 1 Phil. Ins. 519, and cases cited ; 2 Phil. Ins. 358, 359 ; *Marr v. Plummer*, 3 Greenl. 73.

Rand and Fiske, for the plaintiff, to the point, that a copy of the *scire facias* was rightfully allowed to be filed, cited *Jones v. Fales*, 5 Mass. R. 101 ; *Thatcher v. Miller*, 13 Mass. R. 270.

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PUTNAM J. delivered the opinion of the Court. Two questions arise in this case : 1. Whether the Court of Common Pleas erred in permitting a copy of the writ of *scire facias* to be filed, to supply the loss of the original ; 2. Whether the defendant shall be charged as trustee of William M. Hussey.

And several objections have been made, some of them tending to show that the copy which was allowed to be filed was inconsistent with itself in regard to dates, and mainly, that the court should not have permitted any copy to be filed, however correct it might be.

Now the plaintiff produces copies from the clerk, which are of later date than those produced by the defendant, reconciling the proceedings so far as relates to any inconsistency of dates.

But in the correct copy there is no time mentioned for the holding of the court to which the defendant was summoned to appear. That was a good cause for abatement, if a proper plea had been filed in. But the defendant made no plea or objection in abatement, and it is too late to do so after appearance and answering.

The *scire facias* is a judicial writ, which is issued by the clerk, and it is within the power and duty of the court to

amend it, if it should not conform to the original record of the judgment.

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We know by the records, that there was a judgment rendered in the original suit between the parties. There is something to amend by. And we are all satisfied, that the defendant has waived all objection in regard to matter of form, touching this process.

The more material objection is, that the paper which was permitted to be filed as a substitute, was only what the attorney of the plaintiff supposed to be a substantial copy of the original; so that the attorney is made the judge of what was mere form and what was truly the substance of the writ.

But the loss of the original writ should not operate as the loss of the judgment. It would be as correct to say, that the loss of an original deed should affect the grantee's title to the land. If the paper which has been lost can be supplied by a certified copy, it would be more satisfactory than if it were supplied by one supposed to be substantially like the original. But if no such certified copy can be produced, the next best evidence, which is reasonably considered as containing the substantial contents of the lost paper, should be received. In *Jones v. Fales*, 5 Mass. R. 101, the attorney who made the original writ was permitted to prove the contents of the original notes declared upon, or copies of the same, by a reference to the declaration, which was made from the originals or copies.

We are all satisfied, that the Court of Common Pleas very properly allowed the motion of the plaintiff's attorney, to supply the loss of the original writ; and that the defendant cannot be permitted to make any objections to the want of form, after having proceeded to answer it. *Peter v. Benfield*, 3 T. R. 476.

As to the question whether the defendant shall be charged, it would seem that he has admitted, by his default in the original action of *Sturtevant v. Hussey and Trustee*, that he had some goods, &c. of Hussey in his hands, so that the examination now would be confined to the amount. The defendant's counsel have argued, that he ought to be discharged, because the money was to be paid in New York, and that the

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defendant cannot be compelled to pay at any other place. The same objections were made in the case of *Blake v. Williams and Trustees*, 6 Pick. 315. They, by the course of business, were to remit to Williams the balances due to him on account; but it was held, that the money was liable to the foreign attachment here. But the trustee would be entitled to the benefit of the exchange, if it were in favor of the United States, and would be liable for so much as would produce the amount of the money due at the place where it should be paid.

And we apply the same rule to the case at bar.

But the material and second objection against the plaintiff's recovery is, that the defendant paid the debt before the attachment, to one George B. Upton, which payment has been ratified by Hussey.

The facts are, that the defendant bought ten barrels of oil of Hussey, the original defendant, on the 26th of April; that on the 28th, between 11 and 12 o'clock, A. M., the defendant paid the money to George B. Upton, without any order or authority from Hussey; that at 12 meridian of the 28th, the service was made upon the defendant; and that afterwards Hussey ratified the payment, so far as his power to ratify extended.

The cases cited by the defendant's counsel, we think, do not sustain this position, for which he contends. At the time when the writ was served on Robinson, Hussey had not assigned the debt due to him from Robinson, and the *jus disponendi* was taken away by the attachment. He was not at liberty, after the attachment, to prefer Upton to Sturtevant, and the payment to Upton by Robinson, without the authority of Hussey, was, so far as it regarded the plaintiff, a void act. The subsequent ratification might be valid as between the parties to it, but could not affect third persons. It would not transfer the property until an actual ratification should take place, any more than a sale of personal property would be valid against third persons without a delivery. The business was not completed, and the creditor by his attachment put it out of the power of his debtor to carry it into effect.

The judgment is to be entered up for the plaintiff. for the

amount of the sum due for the oil, with interest since the time when the defendant was defaulted in the Court of Common Pleas. Sturtevant
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The rate of exchange between Nantucket and New York, at the time when the money was payable, is to be taken into the account.

And the plaintiff is to recover his costs against the defendant.

WILLIAM RICHARDSON *versus* GEORGE MOREY *et al.*

A testator gives to his wife the use of furniture during her life ; he gives to A. C. all the residue of his estate, real and personal, upon the trusts that he shall receive the income of certain bank shares during the life of the wife and pay the same over to her, and that after her decease he shall hold the same shares and the future income thereof, upon the same trusts as are declared in respect of the residue of the estate subsequently mentioned ; and the testator directs, that the residue of his estate and property shall be held in trust by the trustee, to pay and convey, distribute and divide the same among the testator's six children, so as that each shall have an equal portion of the estate and property conveyed in trust for their use ; that one third part, to be ascertained as nearly as conveniently may be by the trustee, of what shall be the shares of the children respectively, shall be paid respectively to two sons, then of age, immediately after the testator's decease, to two other sons, when they shall respectively come of age, and to two daughters when they shall respectively come of age or be married ; that one other third part shall be paid and conveyed to the children respectively when they shall arrive at the age of twenty-eight years ; and that the residue shall be paid and conveyed to them when they shall respectively arrive at the age of thirty-five years ; that the interest, income and dividends of the property and estate which is not to be paid over to the children immediately after the testator's decease, shall be invested and allowed to accumulate, and when and as they shall come of age, or, if daughters, be married, the trustee shall pay to them respectively their shares of the interest and income already accumulated, and shall from time to time after they respectively come of age, pay over to each his share of the interest and income of the trust property as the same shall accrue, until the principal and property and estate shall be paid and conveyed to them as before directed ; that in case of the death of a child without leaving issue, the trust property belonging to such child not paid before the death, shall be held by the trustee upon the trusts before declared, for the benefit equally of the surviving children ; that the trustee shall keep the buildings belonging to the testator's estate, in good repair and insured against fire, and in case any building should be destroyed by fire, shall dispose of the land belonging thereto, and that he may, if he shall deem it for the interest of all concerned therein, sell a certain parcel of the real estate ; and that he shall invest the proceeds of such sales, and all money which may be received on any policy on any building destroyed by fire, in city stocks, and shall hold the same upon the trusts before declared, for the benefit of the children ; that if the wife should pre-

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fer it, the furniture may be sold by the trustee and the interest of the proceeds be paid to her during life, and the same proceeds, after her death, and any accumulation of interest that may be at that time, shall be held by the trustee upon the trusts before declared for the benefit of the children; and that any trustee which shall be appointed in the room of the one named in the will, shall receive and take and hold the trust property upon the same trusts before declared respecting the same.

It was *held*, that a trustee appointed by the judge of probate in the room of the one named in the will, was entitled to exercise all the powers, and was bound by all the trusts, in the same manner as the one so named would have been entitled and bound:—

That the trustee was not obliged to transfer to the children equal portions of the personal estate and equal portions of the real estate, but that he might transfer to each one its share of the trust property, either in real or personal estate or both, his discretion not being limited, except that the personal estate was first to be distributed:—

That it was not the duty of the trustee forthwith to set apart the several shares of the children and hold them in severalty, but that the property was to remain in his hands to accumulate for the general benefit of all the children until distribution should be made as directed in the will:—

That during the life of the widow, the children were not entitled to have vested in them the legal interest and title in the bank shares or the furniture:—

That upon a child's coming of age, he was to be paid the accumulated interest on the whole of his share up to that time:

And that a child entitled to the payment of one third part of his share, having died without issue, after receiving only a portion of such third part, the residue thereof was to be paid to his administrator, and not to be held by the trustee for the surviving children.

BILL in equity. The principal object of the bill was to obtain a construction of the trusts contained in the will of Asa Richardson.

The will contains the following provisions:—

“Secondly. I give and bequeath to my mother &c. an annuity of one hundred dollars,” &c.

“Thirdly. I do give &c. unto my wife Elizabeth, one moiety of my household furniture, to be selected by her with the approbation of my executor after my decease, to be at her absolute and entire disposal, and I do give to her the use of the residue of my household furniture for and during her natural life.”

“Fourthly. I give and devise unto Amos Cotting, of &c. his heirs and assigns, all the rest and residue of my estate, real, personal and mixed, &c. upon the trusts, &c. that is to say,” as to sixty shares in the Oriental bank, thirty shares in the Merchants’ bank, and ten shares in the Eagle bank,

“upon trust that my said trustee do and shall, from time to time, receive and take the income and dividends as they become due thereon, during the natural life of my said wife, and pay the same over to her, &c. for her sole use and benefit; and after the decease of my said wife, my will is, that my said trustee shall hold the said bank stock and all dividends and income thereof which shall thereafterwards accrue, upon the same trusts as are herein declared in respect of the residue of my estate hereinafter mentioned. And my will is, that my said wife shall receive the gifts, &c. in lieu and instead of dower, &c. And as to all and singular the residue of my estate and property, my will is, that the same shall be held in trust by my said trustee, to pay and convey, distribute and divide the same to and among my six children, Asa, Charles, William, Elizabeth, Sarah Tufts and Horace, at the times and in the manner following, that is to say, my will is, that each of my said children shall have an equal portion of my estate and property herein conveyed in trust for their use and benefit. And my will is, that one third part of what shall be the shares of my sons Asa and Charles, who are now of age, shall be paid and conveyed to them immediately after my decease, the same to be ascertained as nearly as conveniently may be by my said trustee, and that one third part of what shall be the shares of my other sons William and Horace, now under twenty-one years of age, shall be paid and conveyed to them when they respectively arrive at the age of twenty-one years, the same one third part to be ascertained as aforesaid as nearly as conveniently may be, and that one third part of what shall be the shares of my two daughters Sarah Tufts and Elizabeth, now under twenty-one years of age, shall be paid and conveyed to them respectively, to be estimated by my said trustee as nearly as may be, when they shall respectively be married or arrive at the age of twenty-one years, whichever shall first happen. And my will is, that one other third part of what my said children Asa, Charles, William, Elizabeth, Sarah Tufts and Horace, shall be entitled to under this my will, shall be paid and conveyed to them respectively when they shall arrive at the age of twenty-eight years. And my will is, that the residue of what my said children shall be en-

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titled to under this my will, shall be paid and conveyed to them when they shall respectively arrive at the age of thirty-five years. And my said trustee shall hold the property and estate aforesaid in trust to pay and convey the same according to this my will. And my will further is, as to the interest, income and dividends of my property and estate which it is herein provided shall not be paid over to my said children immediately after my decease, but at the times and in the manner herein before mentioned, that the same shall be invested and allowed to accumulate by my said trustee, and such portion of the interest of each child's share as shall be necessary for his support, in the opinion of my said trustee, until such child shall arrive at the age of twenty-one years, or, if a daughter, shall be married, shall from time to time be paid to or for the use and benefit of my said minor children respectively, or to their respective guardians for their use ; and when and as often as the said children shall arrive at the age of twenty-one years, or, if daughters, shall be married, my said trustee shall pay over to my said children respectively their shares of the interest and income already accumulated, and shall from time to time, after my said children respectively arrive at the age of twenty-one years, pay over to every such child his share of the interest, income and dividends of the said trust property as the same shall accrue, until the principal and property and estate shall be paid and conveyed to my said children as herein before directed. And in case of the death of either of my said children without issue, my will is that all the trust property belonging to such child not paid or conveyed to him or her by my said trustee before his or her death, shall be held by my said trustee upon the same trusts herein before declared, for the benefit equally of the surviving children herein before mentioned. And my will is, that my said trustee shall keep the buildings belonging to my estate, in good repair and insured against fire, and shall expend for such purpose such sums as he shall deem reasonable, &c. ; and in case any building should be destroyed by fire, my will is, that my said trustee shall dispose of the lands belonging to the same, to the best advantage, and shall invest the proceeds thereof, and all moneys which may be received upon any policy upon such

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building, in city stocks, and shall stand and be seised thereof upon the same trusts for the use and benefit of my said children, as are herein before declared in respect of the residue of my said property. And my will further is, that my said trustee may, if he shall deem it best for the interest of all concerned therein, sell and dispose of that part of my real estate commonly called Barristers' Hall, and all the buildings thereto adjoining and the lands thereto belonging, for the best price that in his opinion can be obtained for the same, and shall invest the proceeds of such sale, &c. in city stocks, and shall hold and be seised thereof upon the same trusts as are herein declared, for the benefit of my said children, in respect of the residue of the trust property aforesaid ; and my will is, that in case any of my said children shall die leaving lawful issue, then such part of such child's share of my said estate and property as shall not have been paid or conveyed before that time to him or her by my said trustee, shall be paid or conveyed to the lawful issue of such child, &c. And my will is, that in case my said trustee herein appointed shall decline to accept the trusts herein declared, or shall become incapable, &c., the judge of probate in and for the county of Suffolk, or the justices of the Supreme Judicial Court, shall appoint some one or more trustee or trustees instead of my said trustee, who shall receive and take and hold the said trust property upon the same trusts herein before declared respecting the same. And my will is, that my trustee or any trustee of these presents for the time being, shall give bonds, with good and sufficient sureties, for the faithful execution and performance of the trusts hereby declared, and such trustee shall be entitled to a reasonable compensation, &c. And if my wife should prefer it, my will is, that the one half of my household furniture herein given to her use for life, may be sold by my said trustee, and the proceeds invested as aforesaid, and the interest and income thereof shall be paid to my said wife during her life, and the same proceeds, after her death, invested as aforesaid, and any accumulation of interest that may be at that time, shall be held by my said trustee upon the same trusts as are herein before declared in respect of the residue of said trust property herein given for the benefit of my said children."

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The plaintiff was a son of the testator ; the defendants were Morey, who had been appointed the trustee under the will, the testator's widow, and his children Charles, Elizabeth, Sarah Tufts and Horace.

The bill alleges, that the will was made on the 10th of December, 1833 ; that the testator died soon afterwards, his wife and children surviving him ; that the will was duly proved in February, 1834 ; that Cotting declined, in writing, to accept the trusts created by the will, and the judge of probate appointed Morey trustee in his room ; that Morey accepted the trust and gave bond for the faithful discharge of it, and thereupon obtained the possession of all the real and personal estate of the testator ; that the widow accepted the provision in the will in lieu of dower ; that she was appointed guardian of William, the complainant, Sarah Tufts, Elizabeth and Horace, who were then under age ; that the complainant has lately arrived at twenty-one years of age, but that Sarah Tufts, Elizabeth and Horace are still under age and under the guardianship of their mother ; that Asa Richardson, the younger, died in October, 1834, intestate and without leaving issue, and that Charles was appointed administrator on his estate ; and that the trustee paid to Asa a part only of the personal estate to which he was entitled under the will, and conveyed to him no part of the real estate. These facts were admitted in the defendants' answers.

The case was heard upon the bill and answers. It was argued in writing by *Aylwin* and *Paine*, for the plaintiff, and by *Morey*, for the defendants. The questions raised are stated in the opinion of the Court ; which was delivered by

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WILDE J. The plaintiff claims as one of the children and devisees of Asa Richardson, deceased, and seeks to compel the execution of a trust under his last will and testament. The case depends on the construction of that instrument, the language of which, although in some respects sufficiently clear and definite, is with regard to other questions submitted somewhat obscure. We have, however, endeavoured to ascertain as well as we have been able to do, the intention of the testator, and have adopted what appears to us the best construction, though it is not unattended with difficulties.

The testator was possessed of a large estate, both real and

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personal, which, after giving an annuity to his mother and making a provision for his wife, he devises in trust to one Amos Cotting, to be by him distributed and divided among the testator's six children in equal shares ; one third part of two shares to be paid and conveyed to his sons, Asa and Charles, respectively and immediately, they having then arrived at the age of twenty-one years, and one third part to his other sons respectively when they should arrive at the age of twenty-one years, and one third part of his daughters' shares to them as they should respectively arrive at the same age or should be married, which ever might first happen. Another third part of each share was to be paid and conveyed to each of his children when they should respectively arrive at the age of twenty-eight years, and the remaining third part was to be paid and conveyed to each of his children when he or she should arrive at the age of thirty-five years.

The general question is, how and in what manner the trustee is bound in equity to execute these trusts.

Before deciding how these trusts are to be executed, a preliminary question is to be settled, namely, whether the present trustee is entitled to exercise all the powers, and is bound by all the trusts, in the same manner as the original trustee would be entitled and bound had he accepted the trusts.

The plaintiff's counsel contends, that some of the powers given to the trustee designated in the will are personal, implying a special confidence in him, and are not transmissible to the new trustee. That a power given to a trustee, clearly implying a special confidence in the person clothed with the power, would not be transmissible to a new trustee, is admitted ; but there is nothing in this will which implies any special confidence in the original trustee. The powers given are not mere powers, but are so blended with trusts, that a separation might defeat the intention of the testator, and impair the beneficial purposes of the will. But there is a clause in the will which puts this question at rest, even if any special confidence had been reposed in the trustee appointed by the will. The will directs " that if the said trustee should decline to accept the trusts, the judge of probate for the county of Suffolk, or this Court, should appoint some one or more trustee or trustees in

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stead of said trustee so declining, who is to receive, take and hold the trust property upon the same trusts as declared in the will." It is said that the will does not expressly authorize the same discretionary powers ; but it is obvious that the word trusts, as here used, and in other parts of the will, was intended to refer to all the trusts, powers and authority created and given by the will. The powers are blended with and are in nature of trusts, and may be correctly so described. *Cole v Wade*, 16 Ves. 27 ; Sugden on Powers, 393.

Having thus disposed of the preliminary question, we are next to consider in what manner the trustee is bound to execute the trust.

1. The first ground taken by the plaintiff's counsel is, that the children are to receive equal portions of the real, and of the personal estate. The will directs that the children shall each take an equal portion of the estate and property devised in trust for them ; and it is argued that, though equality in value might satisfy the terms used, yet they ought to receive a liberal construction, and be held to embrace not only equality in value, but also equality in the kind of property, and that such a division of the property would be most likely to produce the equality intended by the testator. And the language used in other parts of the will, it is argued, favors this construction. It is said that the words "estate and property," are several times used in a sense to designate real estate and personal property ; and this meaning of the terms is indicated more plainly by their being used in connexion with the words "pay and convey."

This argument undoubtedly derives some weight from the clauses in the will referred to, but we think there are other clauses which are more sure indications of the testator's intention.

By one clause in the will the trustee is directed, in case any building on the trust estate should be destroyed by fire, to dispose of the land to the best advantage, and to invest the proceeds in city stocks ; and by another clause he is authorized if he should deem it best and for the interest of all concerned, to sell and dispose of Barristers' Hall, no time is limited within which these sales were to be made, but it is clear that they were not expected to be made immediately ; and if the plain-

niff's construction is to be adopted, the trustee might be disabled fully to execute these trusts, for after conveying a part of these estates to the two eldest sons he could not sell and dispose of the whole as directed in the will. And such a division of the real estate from time to time into small shares would, we think, probably impair the value of the estate and be attended with difficulties; and therefore such a construction ought not to be adopted, unless the language of the will plainly required it; and it clearly does not, but on the contrary, it appears to us to be sufficiently manifest, that the testator intended that the first payments or distributions to be made to and among the children should be made out of the personal estate, and that afterwards the real estate should be divided and conveyed, but that it was not intended to limit the discretionary power of the trustee so as to compel him to assign to each child an equal share of the personal estate, and an equal share of the real estate; which would be difficult, according to the manner in which the trust estate is to be distributed. The design of the testator seems to have been, that the children should have equal shares, and the trustee was to ascertain as nearly as convenient the value of a share, from time to time, and that each of the *cestui que trusts* was to receive out of the trust property this ascertained value, either in real or personal estate or in both; and that no further limitation of the discretion of the trustee in making the distribution was intended, excepting that the personal estate should be first distributed. The trustee, however, is bound to exercise a sound and reasonable discretion, and to make such a distribution of the trust property as to render the shares of the *cestui que trusts* as equally beneficial to them respectively as may be possible; and an indiscreet and unreasonable distribution of the property might be controlled in a court of equity.

2. In the next place, the plaintiff's counsel insists that it was the duty of the trustee, immediately after the probate of the will, to divide and set apart the several shares of the children, to be held by him in trust and in severalty for the separate use of each, until they should be paid and conveyed as directed in the will. But there is no direction to this effect in the will, nor can we gather from the language of the will that this was

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the intention of the testator. It is true, he speaks of the children's shares, and parts of shares, and the income of their shares, but he does not speak of their divided shares, and it is obvious, we think, that the passages in the will where these expressions are used, refer to the undivided shares of the children in the whole property ; for when the trustee is to pay and convey a third of a share, the value at the time is to be ascertained by the trustee as nearly as conveniently may be. This direction is wholly inconsistent with the supposition, that the shares were before that time to have been divided. It is said that the immediate division of the property into shares would best effectuate the intention of the testator as to equality in the distribution ; but how is the equality of the shares when set apart, to secure an equality in the distribution ? The relative value of the shares would still be exposed to fluctuation, and it would seem that the longer the shares are thus exposed, the greater might be the inequality in the final distribution. The truth is, there is no possible method in which the trust fund can be distributed in pursuance of the will, which can secure the perfect equality of the shares.

From these and other considerations before suggested in relation to the first question, we are satisfied that it was not the intention of the testator that the trust property should be immediately divided into shares, but that it was to remain in the hands of the trustee to accumulate for the general benefit of all the children until distribution should be made as directed in the will.

3. The third question is, whether the plaintiff is now entitled to his share in the remainder of the bank stock, the income of which is payable to the widow ; and in the remainder of the moiety of the household furniture.

It is said, that but for the declaration of trust the children would have a vested interest in this property which might be sold and disposed of by them before it vested in possession. Admitting this, still it would by no means support the plaintiff's claim. It is not necessary, therefore, to consider the question, whether the plaintiff's interest is vested or contingent. The only question is, whether he is now entitled to possession of the property or of its value ; and most clearly he is not.

The trustee is to hold the bank stock during the life of the widow, and to pay over to her the income and dividends. She also has a life estate in the moiety of the furniture, and the legal estate vests in the trustee. He, therefore, cannot distribute the property among the children until after her death; and he is not authorized to sell the remainder and convert it into money. The will, on the contrary, expressly directs, that after the decease of the widow the trustee shall hold the bank stock and receive the dividends which may afterwards accrue thereon, upon the same trusts as are declared as to the residue of the trust property. But of necessity there can be no distribution of these dividends until after the death of the widow. If that event should happen before the final distribution of the other property, the dividends of course would fall into the general fund, and be divided in the same manner as is directed in relation to the residue of the estate; but if the whole residue should be distributed before the death of the widow, then a separate distribution is to be made on the happening of that event.

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And the same principle applies in respect to the moiety of the furniture.

4. The next question relates to the plaintiff's claim to his share of the interest on the trust fund, which had accumulated before he arrived at the age of twenty-one years. The defendants' counsel contends, that as only one third part of the principal is now to be paid, the plaintiff is only entitled to the same share of the interest or income. This depends on the construction of the will.

The trustee, in the first place, is directed to appropriate such portions of the interest of the minor children's shares respectively as may be necessary for their support until they arrive at full age, and then to pay over to them respectively their shares of the interest then accumulated. If the word "shares" is here used in the same sense as it is used in other parts of the will, there can be no question that the plaintiff's construction of the will on this point is correct; for in other parts of the will, the word *share* is uniformly used to designate a child's whole portion in the estate; and the presumption is, that the word was used in the same sense in this clause of the

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will. There is nothing to rebut this presumption to be found in the will, but much to support it. The will directs, that after the children shall respectively arrive at the age of twenty-one years the trustee shall pay over to each child the interest, income, and dividends of the trust property as the same shall accrue, until the principal and property shall be paid and conveyed as directed by the will ; but there is no direction that any part of the interest and income which had accumulated during the minority, should be paid to them at any other time except on their arrival at full age ; and this shows conclusively, as we think, that the whole accumulated interest and income of each share should be then paid.

5. The remaining question is, whether the third part of Asa junior's share, which was payable but not paid over to him in his lifetime, with the interest and income which had accrued, is now to be paid over to his administrator, or falls into the trust fund, for the benefit of the other children.

The words of the will are, " that all the trust property be longing to each child, not paid or conveyed to him or her by my said trustee before his or her death, shall be held by my said trustee upon the same trust before declared, for the benefit equally of the surviving children." By the literal construction of this clause in the will, this part of the trust fund would undoubtedly be held by the trustee for the benefit of the surviving children ; but we do not think that such a literal construction would agree with the intention of the testator.

The trustee is directed to pay over to Asa one third part of his share immediately after the testator's death ; and he must have supposed that this would be paid accordingly. The clause recited, therefore, cannot reasonably be supposed to refer to this portion of the trust property in which Asa had an absolute, vested interest. It could not be the intention of the testator, that this interest should be divested by any neglect of duty in the trustee in not paying over the amount due, or any neglect of Asa in not calling for it immediately. Some time would be required to prove the will, and to ascertain the value of the shares, and if in the mean time Asa had died, it could not, we think, be intended that thereby his estate should be defeated. And if there was time sufficient before his death to have ascertained

the value of the shares and that was not done, the neglect must be imputed to the trustee, for he alone could ascertain the value, and it is a clear principle, that no neglect of a trustee can impair or prejudice the rights of a *cestui que trust*. We think, therefore, that the administrator of Asa's estate is entitled to the remaining sum due to make up a third part of his share, and upon the same rule of construction the administrator is entitled to a share of the interest which had accrued and was payable on Asa's share before his death, if any had so accrued and was payable.

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The will directs that the interest and dividends should be paid over as they accrued ; we do not, however, think the trustee would be bound to distribute every small sum received immediately, but no unreasonable delay ought to be allowed.

If the trustee had received interest and income which ought to have been distributed before the death of Asa, to that distributive share his administrator is now entitled.

COMMONWEALTH *versus* THOMAS AVES.

A citizen of any one of the United States where negro slavery is established by law, who comes into this State for any temporary purpose of business or pleasure, bringing a slave with him as a personal attendant, and stays some time, but does not acquire a domicile here, cannot restrain the slave of his liberty during his continuance here, and carry him out of this State against his consent.

HABEAS corpus. On the 17th of August, 1833, upon the petition of Levin H. Harris, of Boston, representing that a colored female child, named Med, of New Orleans, was unlawfully restrained of her liberty by Thomas Aves of Boston ; a writ of *habeas corpus* was granted by Wilde J., in vacation, directed to the sheriffs of the several counties and their respective deputies, commanding them to have the child before him, and to summon Aves to show the cause of her detention.

In showing cause Aves states upon his oath, that he has the child in his custody ; that in 1833, Samuel Slater, a citizen of the State of Louisiana, domiciled at and residing in the city of New Orleans, purchased the child and its mother as and for his slaves, the mother and child being then and there, and long

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before that time, slaves by the laws of that State ; that from the time of the purchase until about the first day of May, 1836, the mother and child remained the slaves of Slater in New Orleans, and by force of the laws of Louisiana ; that on or about that day Mary Slater, the wife of S. Slater and the daughter of Aves, left New Orleans for the purpose of coming to Boston and visiting her father, intending to return to New Orleans and to her husband, (who remained in that city,) after an absence of four or five months for the purpose above mentioned ; that the mother of the child remained in New Orleans, in slavery, then and still being the property of S. Slater by the laws of Louisiana ; that Mary Slater brought the child with her from New Orleans to Boston, having and retaining the child in her custody as the agent and representative of her husband, her object, intent, and purpose being to have the child accompany her and remain in her custody and under her care during her temporary absence from New Orleans, and that the child should return with her to New Orleans, their legal domicile ; that the child was confided to the custody and care of Aves by Mary Slater, to be by him kept and nurtured during the absence of Mary Slater from Boston for a few days on account of ill health ; that by the laws of Louisiana the marriage of a slave is void ; that this child is the daughter of a slave, born in a state of slavery, and is by force of the laws of Louisiana a natural child ; that by the same laws the mother of a natural child is its legal guardian, and that such right of guardianship over the infant children of a slave, where such children are not themselves slaves, devolves upon the owner of their mother ; that if this child is, by force of the laws of Massachusetts, now emancipated and a free person, S. Slater, as the owner of the mother of this natural child, is entitled to the custody of the person of the child as its legal guardian, and that Aves is the agent and legally authorized representative of S. Slater in this behalf ; that the child is about six years of age and wholly incapable of taking care of itself ; that it is absolutely necessary that some person should have the custody of the person of the child and the right to restrain it of its liberty ; that no private person nor magistrate has, by the laws of Massachusetts, any right to take the child out of the possession of Aves while he

continues to use that possession and custody only for the purpose of benefiting the child, and only restraining it of its liberty so far as is necessary for its safety and health ; and that he does not now and has not at any time restrained it of its liberty in any other way, or to any greater extent, than is necessary for its health and safety.

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The case was adjourned into court, and was argued before all the judges.

B. R. Curtis, for the respondent. In this case I shall endeavour to maintain the following proposition ; that a citizen of a slaveholding State, who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave as a personal attendant on his journey, may restrain the slave for the purpose of carrying him out of Massachusetts and returning him to the domicile of his owner.

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In support of this proposition I shall make two points ;

1. That this child, by the laws of Louisiana, is *now* a slave. She has not been emancipated by coming into a State where slavery is not sanctioned by law, and the moment she returns to Louisiana the right of the master will be recognised as having always subsisted. *Lunsford v. Coquillon*, 14 Martin, 405 ; *Rankin v. Lydia*, 2 Marshall's (Kentucky) Rep. 477 ; *The Slave, Grace*, 2 Haggard's Adm. Rep. 94.

2. That the law of Massachusetts will so far recognize and give effect to the law of Louisiana, as to allow the master to exercise over his slave the qualified and limited right above specified.

Before I proceed to discuss this question, I submit that it is competent to this Court to decide it. No legislation is necessary. It is the proper province of this Court to determine whether any, and what effect, is to be given within our territory, to the law of another State. Story's Conflict of Laws, 25 ; *Blanchard v. Russell*, 13 Mass. R. 6 ; *Dalrymple v. Dalrymple*, 2 Haggard's Consist. Rep. 59.

To recur then to the second point, it cannot be denied that the general principles of international law are broad enough to cover this case. Slaves are looked upon in all codes in two lights, as *persons*, and as *property*. The general rule of international law applicable to them as persons, is, that personal

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capacity or incapacity, attached to a party by the law of his domicile, is deemed to exist everywhere, so long as his domicile remains unchanged. Story's Conflict of Laws, 64 ; *Potter v. Brown*, 5 East, 131. And the rules applicable to slaves as the property of foreigners are equally decisive. Pothier remarks, that movable property has no locality, and that "all things which have no locality follow the person of the owner, and are consequently governed by the law or custom which governs his person, that is to say, by the law of the place of his domicile." And this rule has a more extensive application than merely to regulate the forms of transfer or the order of succession to personal property ; it means, that a right to a movable thing, acquired in one country under its laws, ought not to be and is not divested by removing that thing into another country. Story's Conflict of Laws, 209, 312, 313, 334, 335, 336.

There are two well-settled exceptions to the operation of a foreign law ; 1. when it would work injury to the State or its citizens ; 2. when the law is in itself immoral. Story's Conflict of Laws, 96 ; 2 Kent's Comm. (3d edit.) 457, 458 ; *Greenwood v. Curtis*, 6 Mass. R. 378. But neither of these exceptions is applicable to the present case.

Before speaking to these points, I will anticipate an objection which is supported by high authority. In the case of *Sommersett*, 20 Howell's State Tr. 79, Lord *Mansfield*, speaking of slavery, remarks, "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme ; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." It will be urged, that though we claim to exercise only a qualified and limited right over the slave, namely, the right to remove him from the State, yet if this is allowed, all the rights of the master must be allowed ; that the same foreign law which gives the master a right to remove the slave from place to place, gives him a right to his labor, and to compel him to labor ; and that if the foreign law is recognised at all, full effect must be given to it, and thus slavery will be introduced into the Commonwealth. To this we answer, that there is no *practical*

difficulty in giving this qualified effect to the law of Louisiana, or in the case of a *fugitive* slave the constitution of the United States provides for and secures to the master the exercise of his right, to the precise extent now claimed. And if there be any *theoretical* difficulty, as suggested by Lord *Mansfield*, it has not been found insurmountable by the English judges since his day. Where ships of other nations engaged in the slave trade have been captured by British cruisers, if the slave trade was allowed by the laws of the nation to which the vessel belonged, the vessel and slaves have been restored to the owners. *The Amedie*, 1 Acton, 240 ; *The Fortuna*, 1 Dodson, 81 ; *The Diana*, 1 Dodson, 95 ; *Le Louis*, 2 Dodson, 233 ; *Madrazo v. Willes*, 3 Barn. & Ald. 358 ; *Emerson v. Howland*, 1 Mason, 45. It might as well be objected, that this Commonwealth, by permitting a foreign country to reclaim a fugitive from justice, would recognize the right of such country to try, condemn and punish him on our soil. *Rex v. Ball*, 1 American Jurist, 297 ; Story's Conflict of Laws, 24.

I will now attempt to show, that to permit such an exercise of the right of the master as is now claimed, will work no injury to this State or its citizens.

1. It will work no injury by violating any public law of the State. The only statute relating to this subject (Revised Stat. c. 125, § 20,) provides, that no person shall "*without lawful authority*," forcibly or secretly confine or imprison any other person within this State, or forcibly carry or send any such person out of this State, &c. But in this case the master has "*lawful authority*."

2. It will work no direct injury to the citizens of this State, for it has no direct effect on its citizens. It respects only strangers.

3. It is not inconsistent with the public policy of this State. It is to be borne in mind, that we are considering the policy of Massachusetts towards citizens of other States, and not towards her own citizens. Laws and institutions may exist in other States, which we cannot allow to be imported into this State, but at the same time it may be perfectly consistent with our policy, not only to recognize their propriety and validity in the states where they exist, but even to interfere actively to

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enable the citizens of those states to enjoy those institutions at home. It is also important to keep in view the relations which we sustain to Louisiana. She is not a foreign nation. We are bound up with her and the other slave-holding states, by the constitution, into a union, upon the preservation of which no one doubts that our own peace and welfare depend. The constitution of the United States furnishes a guide in the question. As it provides for the exercise of the right of the master over fugitive slaves, it gives us some reason to believe that it is consistent with the public policy of Massachusetts to protect his right to that extent, at least. It will be urged that the express provision for the exercise of this right in one class of cases, is an argument to prove that the exercise of it in any other case would be contrary to our policy. To this it may be answered, that the constitution provides for that class of cases which was most important; a class which requires the active interposition of the law. The slave-holding States might be willing to leave other cases to the comity of the non-slaveholding States; and non-slaveholding States might be willing to accord as a favor and as a matter of comity, more than they were willing to surrender as a matter of right. Accordingly, soon after the adoption of the federal constitution, the legislature of New York, Rhode Island, Pennsylvania and New Jersey, passed laws securing to citizens of slave States, who came within their territories as travellers and brought slaves with them, a right to take those slaves back to their domicil. 1 Revised Laws of New York, 657; Laws of Rhode Island, (edit. of 1798,) 607; Purdon's Dig. of Laws of Penn., 650; Laws of New Jersey, 679.

Slavery is not immoral; and to allow the master to exercise the right in question will not exhibit to our citizens "an example pernicious and detestable." It is true, it is not consistent with natural right; but the standard of morality by which courts of justice are to be guided, is that which the law prescribes. *Le Louis*, 2 Dodson, 249; *The Antelope*, 10 Wheaton, 121; *Madrazo v. Willes*, 3 Barn. & Ald. 353; *Emerson v. Howland*, 1 Mason, 45; *Commonwealth v. Griffith*, 2 Pick. 19.

Of the authorities which bear more directly on the question before the Court, the leading case is that of *Somerset*, 20

Howell's State Trials, 1. We admit that this case settled the law of England. It is to be regretted, however, that the grounds on which the court proceeded are not more fully reported. We are able to discover but three principles in the opinion. One is, the difficulty above mentioned, of adopting the relation of slavery, without adopting it in all its consequences. Secondly, it is said, "Contract for sale of a slave is good here ; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of inquiry ; which makes a very material difference." 20 Howell's State Tr. 79. I am unable to perceive the distinction. The subject of such a contract is the person of the slave, and in an action on such contract the subject of inquiry is ; whether the vendor sold to the purchaser the person of the slave. And in 3 Barn. & Ald. 353, in the action brought against the captain of a British cruiser, the subject of inquiry was, whether the plaintiff owned the persons of the slaves, and the defendant destroyed his property. How then can it be said that the person of the slave comes in question in the one case more than in the other ? The third principle is, that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons moral or political, but only by positive law." "Slavery is so odious, that nothing can be suffered to support it but positive law." Now, if by positive law is meant a law enacted by the legislative power of the country, this assertion is not true in point of fact ; for in all modern states, with the exception of some of the colonies of Spain, slavery has been introduced by custom, and without any action of the legislative power. If by positive law, it is meant that there must be some law of the State, which at least permits the master to exercise acts of ownership over the slave, this is undoubtedly true ; and such a law we expect to find in Massachusetts, in the principle which declares that the law of the domicile shall govern, as to the relations between foreigners, except in so far as it contradicts our own policy and laws. If by positive law is meant a law of the State where the question arises, without reference to the law of the domicile, and that the law of the domicile cannot be in any degree

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regarded, even where the question arises between strangers the position is not law, even in England, as is proved by the cases in which the English courts have recognized the foreigner's right of property in slaves.

But the grounds on which we distinguish this case from that of *Sommersett* are, that the owner of *Sommersett* was a British subject, resident in Virginia, then a British colony ; that the question of national comity did not arise in that case ; that none of the considerations which grow out of our close and peculiar relations with the State of Louisiana, there existed ; that the public policy of England, in respect to her dependent colonies, was a very different thing from the public policy of Massachusetts, in respect to her sister States ; that a citizen of Louisiana has a different standing in our courts, at this day, from the standing of a Virginian in the King's Bench in 1772, just before the breaking out of the revolutionary war ; in short, that *Sommersett's* case was decided by an English court, on considerations proper to that country, and that this case is to be decided by a Massachusetts court, upon reasons proper to ourselves. Suppose that slavery had existed in Scotland before the union ; that it had become incorporated into all her institutions, civil, political and domestic ; that it was not only of great importance to the Scottish nation, but a matter in which they felt an intense interest, transcending even its real importance ; that the existence of this institution was one of the chief obstacles to a union of the two kingdoms ; that its protection was provided for and guaranteed, and the faith of the English nation pledged thereto, by the act of union ; that it was made the basis of taxation and representation, in the imperial parliament ; and then suppose that a Scottish gentleman had been travelling in England with his slave, and restraining him for the purpose of carrying him back to Scotland, and that this slave had been brought before Lord *Mansfield* on a writ of *habeas corpus* ; would the slave have been dismissed from the custody of his master, on the ground that slavery was so odious, that the master should not be permitted to carry his slave home, because there was no positive law of parliament providing for the case ? Should we not have heard something of the act of union ; of the intimate relations between the two

kingdoms ; of the great importance of the institution to the sister kingdom ; of the state of feeling there on the subject ; of the necessity of preserving amicable feelings and encouraging intercourse between the people of the different sides of the border . We submit that the result would have been different from the result of *Sommersett's case*.

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In support of our view of the case before the Court, we cite *The Antelope*, 10 Wheaton, 66 ; 3 American Jurist, 407 ; *Rankin v. Lydia*, 2 Marshall, (Kentucky,) 477.

Ellis G. Loring, for the Commonwealth. It has been urged by the counsel for the respondent, that the citizens of the slave States, visiting Massachusetts, are to be permitted to bring their slaves with them, and to take them away on their return ; that this permission is required of us by the comity of nations ; and that this obligation arises from the general doctrines of international law, and also from the peculiar relation existing between the members of the Union.

Comity is not to be exercised in doubtful cases ; and whenever a "doubt does exist, the court which decides, will prefer the law of its own country, to that of the stranger." *Saul v. His Creditors*, 17 Martin, 596 ; *Story's Confli. of Laws*, 29, 271.

Comity is practically founded on the consent of nations, and the need which is felt of reciprocal good offices. Now nothing is more certain than that no such consent of nations prevails on this subject, in any part of Europe. 20 *Howell's State Tr.* 61 ; 2 *Kent's Comm.* (1st edit.) 203. Nor is there room here for reciprocity. We have no slaves in Massachusetts, in regard to whom we can ask the same comity which is claimed of us. Nay, the comity which is due to *freemen*, is not extended to us by the slave-holding States. In all those States, color furnishes a presumption of slavery, and a free colored citizen may be called on to prove affirmatively his freedom, or be sold into slavery. In direct violation of the constitutional provision guarantying to the citizens of each State "all privileges and immunities of citizens in the several States," colored citizens of the North, seamen or others, are forbidden by law from entering many of the southern ports of this Union, on peril of being confined in jail till the departure

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of the vessel in which they arrived, the captain to pay the jail expenses, under the penalty of 1000 dollars fine and not less than six months imprisonment. Laws of South Carolina, 1823, c. 20 ; Laws of Georgia, 1829, c. 68 ; 1 Martin's Dig. of Laws of Louisiana, 678.

There is no room for comity, where the subject has been made matter of express regulation. The constitution of the United States secures to the master the right to reclaim his slave who *escapes* from the State where he is held to service, and it is not to be supposed that the southern framers of the constitution would leave a doubtful point, like the present, to be settled by comity, while they guarded with jealous care an apparently far stronger right. 3 Story on the Constitution, 676. Still less is the doctrine of comity admissible, where, as in the adoption of the federal constitution, the express regulations are the result of mutual concessions, after long dispute and difficulty. *Commonwealth v. Griffith*, 2 Pick. 19.

The law of the foreign domicile will be found to be applied chiefly to cases of mere contract. In respect to the domestic relations, comity cannot be allowed so wide a range.

It is laid down as a necessary exception to the rule of comity, that no people are bound to enforce or hold valid in their courts of justice, any contract or law, which offends their morals, or contravenes their policy, or violates a public law, or offers a pernicious example. 2 Kent's Comm. (3d edit.) 457 ; Story's Conf. 95 ; *Greenwood v. Curtis*, 6 Mass. R. 358.

Slavery is within all these exceptions.

It is offensive to morals. The testimony of ethical writers against slavery is unanimous and decisive. And some of the most eminent statesmen of the South, as Patrick Henry, Thomas Jefferson, William Pinckney, have concurred with the moralist and civilian on this subject. *Forbes v. Cochrane*, 3 Dowl. & Ryl. 679 ; S. C. 2 Barn. & Cressw. 448 ; Wayland's Elem. of Moral Science, 209 ; Rutherford's Inst. Nat. Law, bk. 1, c. 20 ; *Sommersett's case*, 20 Howell's St. Tr. 32, note ; Stroud's Sketch of the Laws relating to Slavery in the U. S. 25 ; Civil Code of Louisiana, art. 35 ; Mass. Declaration of Rights, art. 1 ; *Winchendon v. Hatfield*, 4 Mass. R. 128 ; *Greenwood v. Curtis*, 6 Mass. R. 366, note . Story's Conf. 215. note.

Slavery contravenes our policy. Massachusetts has known nothing like the slave system of Louisiana. The slavery which was abolished here nearly sixty years since, resembled little more than in name the hard bondage of the South. It was milder than the ancient English villenage, and differed from apprenticeship only in its duration. Ancient Charters, &c. 52; *Winchendon v. Hatfield*, 4 Mass. R. 127; Reeve's Dom. Rel. 340; 2 Dane's Abr. 313; 20 Howell's State Tr. 66.

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Slavery violates our public law. The law of this Commonwealth, on slavery, from the adoption of the constitution of Massachusetts to the ratification of the federal constitution, was to all intents and purposes the same with the law of England as settled in *Sommersett's case*, in 1772. *Winchendon v. Hatfield*, 4 Mass. R. 127.

Slavery sets before our citizens a pernicious and detestable example. Whatever is in itself bad and capable of imitation, must be, if tolerated among us, of bad example. It is not a satisfactory answer, that the constitution prohibits the holding of slaves in this State; the constitution is only the expression of public sentiment, and may be altered if that sentiment shall change.

But it has been argued, that as the constitution of the United States recognizes slavery, we are estopped to deny its morality or policy. It is true, we have agreed to recognize slaves as a basis for direct taxation and representation, and to give them up when they abscond into the free States. So far we are estopped, but no further. Amendments to Constitution of U. S. art. 10. It has been decided in some of the States, that the provision respecting slaves *escaping* from one State into another, does not extend to the case of a slave *voluntarily* carried by his master into another State; and the statutory provisions of New York and some other States, cited by the counsel for the respondent, were enacted on the ground that the special exemption was necessary, to prevent the local law of freedom from entirely annulling the law of the foreign domicile. *Butler v. Hopper*, 1 Wash. C. C. R. 499; *Ex parte Simmons*, 4 Wash. C. C. R. 396; Stroud's Sketch, &c. 167; *Lunsford v. Coquillon*, 14 Martin, 401. So slavery

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was tolerated by law in the British colonies, but this did not prevent the Court of King's Bench from deciding on its immorality and impolicy in England. 20 Howell's State Tr. 82. The law of all Europe is, that slavery is a local institution ; that slaves in the colonies are *property*, but that in the parent country they are *men*. On this account, Lord *Mansfield* says, (20 Howell's State Tr. 79,) there is no difficulty in giving effect in England, to a contract made in a foreign country for the sale of a slave ; but where the person of the slave is in England and becomes the subject in controversy, that is a widely different case. If this distinction is kept in view, coupled with the principle that no civilized nation will sanction an aggression upon the legal rights of the subjects of other friendly nations within their own limits, there will be no great difficulty in reconciling the admiralty and other cases cited on the other side, with the point for which we contend. *Forbes v. Cochrane*, 3 Dowl. & Ryl. 679, and 2 Barn. & Cressw. 448 ; *Knight v. Wedderburn*, 20 Howell's State Tr. 3, note. We have adopted in this country a policy analogous to that of England, by recognizing slavery as a local or partially acknowledged institution. Our law is, that slaves are *property* (except as to representation) while they remain under the local law of slavery, or when they appear elsewhere in the character of fugitives. They are, on the other hand, *men*, where representation in Congress is concerned, or whenever they come rightfully within the limits of the local law of freedom. *Ex parte Simmons*, 4 Wash. C. C. R. 396 ; *Commonwealth v. Holloway*, 2 Serg. & Rawle, 305 ; *Saul v. His Creditors*, 17 Martin, 598 ; *Francisco's case*, 9 American Jurist, 490 , Story's Confli. 92

The comity asked in the present case is not for a mere *transitus*, but is to be extended to a temporary residence. How long shall that temporary residence continue ? Why may not citizens of the slave States remain here with their slaves ten years as well as ten months, if the *animus revertendi* is preserved ?

The force of Lord *Mansfield's* remark, that "the difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme," remains unimpaired by the

argument for the respondent. The counsel has limited the master's claim to the utmost, yet let us see what it still includes. It must include the right absolutely to direct the slave's locomotion ; to confine his person ; to exact his labor without wages ; and to force him out of Massachusetts by any degree of personal violence which may be requisite. If the slave should marry here, he must of course be separated from his wife. Can he make a contract ? Will his marriage be valid, or will it be void and his children illegitimate ? Are the children born here of a slave mother, to be also slaves ? Or will their father, if he should be a free citizen of Massachusetts, be entitled to his own children ? If the slave sees a crime committed by his master, shall he be admitted as a witness ? And if he shall testify against his master, what treatment may he expect upon his return to the slave State ? If a slave is slandered in Massachusetts, has he a remedy ? If he is assaulted by a stranger, has he an action as a *person*, or does the action belong to his master as for an injury to *property* ? May the master be bound to keep the peace towards his slave ? If the slave refuse to leave the State, may the master justify an assault and battery upon him ? Suppose he kills his master in self-defence, is his act murder ?

Choate, on the same side. It is argued on the part of the respondent, that no principle concerning the comity of nations was settled in *Sommersett's* case, because Virginia was not then independent of Great Britain. But this is not so. The comity of nations, as understood in the books of law, means a respect paid to a *lex loci*, whether of an independent state or a state not independent. It does not suppose a conflict of independent nations, but a conflict of codes. Thus the respect paid in England to the local law of Scotland, is paid by the comity of nations. The decision in *Sommersett's* case took place before the American revolution, and so soon as the principle there settled became applicable to our circumstances, that is, so soon as we abolished slavery, it had instantly the force of authority. At any rate, there is satisfactory historical evidence that it was adopted here, even before the adoption of our constitution.

C. P. Curtis replied.

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SHAW C. J. delivered the opinion of the Court. The question now before the Court arises upon a return to a *habeas corpus*, originally issued in vacation by Mr. Justice *Wilde*, for the purpose of bringing up the person of a colored child named Med, and instituting a legal inquiry into the fact of her detention, and the causes for which she was detained. By the provisions of the revised code, the practice upon *habeas corpus* is somewhat altered. In case the party complaining, or in behalf of whom complaint is made, on the ground of unlawful imprisonment, is not in the custody of an officer, as of a sheriff or deputy, or corresponding officer of the United States, the writ is directed to the sheriff, requiring him or his deputy to take the body of the person thus complaining, or in behalf of whom complaint is thus made, and have him before the court or magistrate issuing the writ, and to summon the party alleged to have or claim the custody of such person, to appear at the same time, and show the cause of the detention. The person thus summoned is to make a statement under oath, setting forth all the facts fully and particularly; and in case he claims the custody of such party, the grounds of such claim must be fully set forth. This statement is in the nature of a return to the writ, as made under the former practice, and will usually present the material facts upon which the questions arise. Such return, however, is not conclusive of the facts stated in it, but the court is to proceed and inquire into all the alleged causes of detention, and decide upon them in a summary manner. But the court may, if occasion require it, adjourn the examination, and in the mean time bail the party, or commit him to a general or special custody, as the age, health, sex, and other circumstances of the case may require. It is further provided, that when the writ is issued by one judge of the court in vacation, and in the mean time, before a final decision, the court shall meet in the same county, the proceedings may be adjourned into the court, and there be conducted to a final issue, in the same manner as if they had been originally commenced by a writ issued from the court. I have stated these provisions the more minutely, because there have been as yet but few proceedings under the Revised Statutes, and the practice is yet to be established.

Upon the return of this writ before Mr. Justice *Wilde*, a statement was made by Aves, the respondent; the case was then postponed. It has since been fully and very ably argued before all the judges, and is now transferred to and entered in court, and stands here for judgment, in the same manner as if the writ had been originally returnable in court. Notice having been given to Mr. and Mrs. Slater, an appearance has been entered for them, and in this state of the case and of the parties, the cause has been heard. The statement on oath is now to be considered in the same aspect as if made by Mr. Slater. It is made in fact by Aves, claiming the custody of the slave in right of Slater, and that claim is sanctioned by Slater, who appears by his attorney to maintain and enforce it. He claims to have the child as master, and carry her back to New Orleans, and whether the claim has been made in terms or not, to hold and return her as a slave, that intent is manifest, and the argument has very properly placed the claim upon that ground.

The case presents an extremely interesting question, not so much on account of any doubt or difficulty attending it, as on account of its important consequences to those who may be affected by it, either as masters or slaves.

The precise question presented by the claim of the respondent is, whether a citizen of any one of the United States, where negro slavery is established by law, coming into this State, for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicile here, who brings a slave with him as a personal attendant, may restrain such slave of his liberty during his continuance here, and convey him out of this State on his return, against his consent. It is not contended that a master can exercise here any other of the rights of a slave owner, than such as may be necessary to retain the custody of the slave during his residence, and to remove him on his return.

Until this discussion, I had supposed that there had been adjudged cases on this subject in this Commonwealth; and it is believed to have been a prevalent opinion among lawyers, that if a slave is brought voluntarily and unnecessarily within the limits of this State, he becomes free, if he chooses to avail himself of the provisions of our laws; not so much because his

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coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his *status*, or condition, as settled by the law of his domicil, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal. There seems, however, to be no decided case on the subject reported.

It is now to be considered as an established rule, that by the constitution and laws of this Commonwealth, before the adoption of the constitution of the United States, in 1789, slavery was abolished; as being contrary to the principles of justice, and of nature, and repugnant to the provisions of the declaration of rights, which is a component part of the constitution of the State.

It is not easy, without more time for historical research than I now have, to show the course of slavery in Massachusetts. By a very early colonial ordinance, (1641,) it was ordered, that there should be no bond slavery, villenage, or captivity amongst us, with the exception of lawful captives taken in just wars, or those judicially sentenced to servitude, as a punishment for crime. And by an act a few years after, (1646,) manifestly alluding to some transaction then recent, the general court conceiving themselves bound to bear witness against the heinous and crying sin of manstealing, &c., ordered that certain negroes be sent back to their native country (Guinea) at the charge of the country, with a letter from the governor expressive of the indignation of the court thereabouts. See Ancient Charters, &c., 52, c. 12, § 2, 3.

But notwithstanding these strong expressions in the acts of the colonial government, slavery to a certain extent seems to have crept in; not probably by force of any law, for none such is found or known to exist; but rather, it may be presumed, from that universal custom, prevailing through the European colonies, in the West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent states. That it was so established, is shown by this, that by several provincial acts, passed at various times, in the early part of the last century, slavery was recognized as existing in fact, and various regulations were prescribed

in reference to it. The act passed in June, 1703, Anc. Charters, &c., 746, imposed certain restrictions upon manumission, and subjected the master to the relief and support of the slaves, notwithstanding such manumission, if the regulations were not complied with. The act of October, 1705, Anc. Charters, &c., 748, 749, levied a duty and imposed various restrictions upon the importation of negroes, and allowed a drawback upon any negro thus imported and for whom the duty had been paid, if exported within the space of twelve months and *bond fide* sold in any other plantation.

How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of the opinion in *Somerset's* case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility ; it being agreed on all hands, that if not abolished before, it was so by the declaration of rights. In the case of *Winchendon v. Hatfield*, 4 Mass. R. 123, which was a case between two towns respecting the support of a pauper, Chief Justice *Parsons*, in giving the opinion of the Court, states, that in the first action which came before the Court after the establishment of the constitution, the judges declared, that by virtue of the declaration of rights, slavery in this State was no more. And he mentions another case, *Littleton v. Tuttle*, 4 Mass. R. 128, note, in which it was stated as the unanimous opinion of the Court, that a negro born within the State, before the constitution, was born free, though born of a female slave. The chief justice, however, states, that the general practice and common usage have been opposed to this opinion.

It has recently been stated as a fact, that there were judicial decisions in this State prior to the adoption of the present constitution, holding that negroes born here of slave parents were free. A fact is stated in the above opinion of Chief Justice *Parsons*, which may account for this suggestion. He states that several negroes, born in this country, of imported slaves, had demanded their freedom of their masters by suits at law, and obtained it by a judgment of court. The defence of the master, he says, was faintly made, for such was the temper of

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the times, that a restless, discontented slave was worth little, and when his freedom was obtained in a course of legal proceedings, his master was not holden for his support, if he became poor. It is very probable, therefore, that this surmise is correct, and that records of judgments to this effect may be found ; but they would throw very little light on the subject.

Without pursuing this inquiry farther, it is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. " All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the States, where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other.

Such being the general rule of law, it becomes necessary to inquire how far it is modified or controlled in its operation ; either,

1. By the law of other nations and states, as admitted by the comity of nations to have a limited operation within a particular state ; or

2. By the constitution and laws of the United States.

In considering the first, we may assume that the law of this State is analogous to the law of England, in this respect ; that while slavery is considered as unlawful and inadmissible in both,

and this because contrary to natural right and to laws designed for the security of personal liberty, yet in both, the existence of slavery in other countries is recognized, and the claims of foreigners, growing out of that condition, are, to a certain extent, respected. Almost the only reason assigned by Lord *Mansfield* in *Sommersett's* case was, that slavery is of such a nature, that it is incapable of being introduced on any reasons moral or political, but only by positive law; and, it is so odious, that nothing can be suffered to support it but positive law.

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The same doctrine is clearly stated in the full and able opinion of *Marshall C. J.*, in the case of the *Antelope*, 10 Wheat. 120. He is speaking of the slave trade, but the remark itself shows that it applies to the state of slavery. "That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted, and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of the admission."

But although slavery and the slave trade are deemed contrary to natural right, yet it is settled by the judicial decisions of this country and of England, that it is not contrary to the law of nations. The authorities are cited in the case of the *Antelope*, and that case is itself an authority directly in point. The consequence is, that each independent community, in its intercourse with every other, is bound to act on the principle, that such other country has a full and perfect authority to make such laws for the government of its own subjects, as its own judgment shall dictate and its own conscience approve, provided the same are consistent with the law of nations; and no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state, or on the high seas, which each has an equal right to use and occupy; and that each sovereign state, governed by its own laws, although competent and well authorized to make such laws as it may think most expedient to the extent of its own territorial limits, and for the government of its own subjects, yet beyond those limits, and over those who are not her own subjects, has no authority to enforce her own laws,

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or to treat the laws of other states as void, although contrary to its own views of morality.

This view seems consistent with most of the leading cases on the subject.

Sommersett's case, 20 Howell's State Trials, 1, as already cited, decides that slavery, being odious and against natural right, cannot exist, except by force of positive law. But it clearly admits, that it may exist by force of positive law. And it may be remarked, that by positive law, in this connection, may be as well understood customary law as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence or by the legislative act of any state, and which derive their force and authority from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation.

Le Louis, 2 Dodson, 286. This was an elaborate opinion of Sir *William Scott*. It was the case of a French vessel seized by an English vessel in time of peace, whilst engaged in the slave trade. It proceeded upon the ground, that a right of visitation, by the vessels of one nation, of the vessels of another, could only be exercised in time of war, or against pirates, and that the slave trade was not piracy by the laws of nations, except against those by whose government it has been so declared by law or by treaty. And the vessel was delivered up.

The Amedie, 1 Acton, 240. The judgment of Sir *William Grant* in this case, upon the point on which the case was decided, that of the burden of proof, has been doubted. But upon the point now under discussion, he says, "but we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence. I say, abstractedly speaking, because we cannot legislate for other countries; nor has this country a right to control any foreign legislature, that may give permission to its subjects to prosecute this trade." He however considered, in consequence of the principles declared by the British government, that he was bound to hold, *primâ facie*, that the traffic was unlawful, and threw on the claimant the burden of proof, that the traffic was permitted by the law of his own country.

The Diana, 1 Dodson, 95. This case strongly corroborates the general principle, that though the slave trade is contrary to the principles of justice and humanity, it cannot with truth be said, that it is contrary to the laws of all civilized nations; and that courts will respect the property of persons engaged in it under the sanction of the laws of their own country

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Two cases are cited from the decisions of courts of common law, which throw much light upon the subject.

Madrazo v. Willes, 3 Barn. & Ald. 353. It was an action brought by a Spaniard against a British subject, who had unlawfully, and without justifiable cause, captured a ship with three hundred slaves on board. The only question was the amount of damages. *Abbott C. J.*, who tried the cause, in reference to the very strong language of the acts of Parliament, declaring the traffic in slaves a violation of right and contrary to the first principles of justice and humanity, doubted whether the owner could recover damages, in an English court of justice, for the value of the slaves as property, and directed the ships and the slaves to be separately valued. On further consideration, he and the whole court were of opinion, that the plaintiff was entitled to recover for the value of the slaves. That opinion went upon the ground, that the traffic in slaves, however wrong in itself, if prosecuted by a Spaniard between Spain and the coast of Africa, and if permitted by the laws of Spain, and not restrained by treaty, could not be lawfully interrupted by a British subject, on the high seas, the common highway of nations. And *Mr. Justice Bayley*, in his opinion, after stating the general rule, that a foreigner is entitled, in a British court of justice, to compensation for a wrongful act, added, that although the language used by the statutes was very strong, yet it could only apply to British subjects. It is true, he further says, that if this were a trade contrary to the laws of nations, a foreigner could not maintain this action. And *Best J.* spoke strongly to the same effect, adding, that the statutes "speak in just terms of indignation of the horrible traffic in human beings, but they speak only in the name of the British nation. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is

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impossible to say, that the slave trade is contrary to what may be called the common law of nations."

Forbes v. Cochrane, 2 Barn. & Cressw. 448; S. C. 3 Dowl. & Ryl. 679. This case has been supposed to conflict with the one last cited; but I apprehend, in considering the principles upon which they were decided, they will be found to be perfectly reconcilable. The plaintiff, a British subject, domiciled in East Florida, where slavery was established by law, was the owner of a plantation, and of certain slaves, who escaped thence and got on board a British ship of war on the high seas. It was held, that he could not maintain an action against the master of the ship for harbouring the slaves after notice and demand of them. Some of the opinions given in this case are extremely instructive and applicable to the present. *Holroyd J.*, in giving his opinion, said, that the plaintiff could not found his claim to the slaves upon any general right, because by the English laws such a right cannot be considered as warranted by the general law of nature, that if the plaintiff could claim at all, it must be in virtue of some right which he had acquired by the law of the country where he was domiciled, that where such rights are recognized by law, they must be considered as founded, not upon the law of nature, but upon the particular law of that country, and must be co-extensive with the territories of that state; that if such right were violated by a British subject, within such territory, the party grieved would be entitled to a remedy, but that the law of slavery is a law *in invitum*, and when a party gets out of the territory where it prevails, and under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the place only, does not continue. So in speaking of the effect of bringing a slave into England, he says, he ceases to be a slave in England, only because there is no law which sanctions his detention in slavery. *Best J.* declared his opinion to the same effect. "Slavery is a local law, and therefore if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local

law, they have broken their chains, they have escaped from their prison, and are free."

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That slavery is a relation founded in force, not in right, existing, where it does exist, by force of positive law, and not recognized as founded in natural right, is intimated by the definition of slavery in the civil law; "*Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.*"

Upon a general review of the authorities, and upon an application of the well established principles upon this subject, we think they fully maintain the point stated, that though slavery is contrary to natural right, to the principles of justice, humanity and sound policy, as we adopt them and found our own laws upon them, yet not being contrary to the laws of nations, if any other state or community see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of the existence of those laws, and we are not at liberty to declare and hold an act done within those limits, unlawful and void, upon our views of morality and policy, which the sovereign and legislative power of the place has pronounced to be lawful. If, therefore, an unwarranted interference and wrong is done by our citizens to a foreigner, acting under the sanction of such laws, and within their proper limits, that is, within the local limits of the power by whom they are thus established, or on the high seas, which each and every nation has a right in common with all others to occupy, our laws would no doubt afford a remedy against the wrong done. So, in pursuance of a well known maxim, that in the construction of contracts, the *lex loci contractus* shall govern, if a person, having in other respects a right to sue in our courts, shall bring an action against another, liable in other respects to be sued in our courts, upon a contract made upon the subject of slavery in a state where slavery is allowed by law, the law here would give it effect. As if a note of hand made in New Orleans were sued on here, and the defence should be, that it was on a bad consideration, or without consideration, because given for the price of a slave sold, it may well be admitted, that such a

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defence could not prevail, because the contract was a legal one by the law of the place where it was made.

This view of the law applicable to slavery, marks strongly the distinction between the relation of master and slave, as established by the local law of particular states, and in virtue of that sovereign power and independent authority which each independent state concedes to every other, and those natural and social relations, which are everywhere and by all people recognized, and which, though they may be modified and regulated by municipal law, are not founded upon it, such as the relation of parent and child, and husband and wife. Such also is the principle upon which the general right of property is founded, being in some form universally recognized as a natural right, independently of municipal law.

This affords an answer to the argument drawn from the maxim, that the right of personal property follows the person, and therefore, where by the law of a place a person there domiciled acquires personal property, by the comity of nations the same must be deemed his property everywhere. It is obvious, that if this were true, in the extent in which the argument employs it, if slavery exists anywhere, and if by the laws of any place a property can be acquired in slaves, the law of slavery must extend to every place where such slaves may be carried. The maxim, therefore, and the argument can apply only to those commodities which are everywhere, and by all nations, treated and deemed subjects of property. But it is not speaking with strict accuracy to say, that a property can be acquired in human beings, by local laws. Each state may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them; as, for instance, that they may be bought and sold, delivered, attached, levied upon, that trespass will lie for an injury done to them, or trover for converting them. But it would be a perversion of terms to say, that such local laws do in fact make them personal property generally; they can only determine, that the same rules of law shall apply to them as are applicable to property, and this effect will follow only so far as such laws *proprio vigore* can operate.

The same doctrine is recognized in Louisiana. In the case of *Lunsford v. Coquillon*, 14 Martin's Rep. 402, it is thus stated ; — " The relation of owner and slave is, in the States of this Union in which it has a legal existence, a creature of the municipal law." See Story's Conflict of Laws, 92, 97.

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The same principle is declared by the court in Kentucky, in the case of *Rankin v. Lydia*, 3 Marshall, 470. They say, slavery is sanctioned by the laws of this State ; but we consider this as a right existing by positive law of a municipal character, without foundation in the law of nature.

The conclusion to which we come from this view of the law is this :

That by the general and now well established law of this Commonwealth, bond slavery cannot exist, because it is contrary to natural right, and repugnant to numerous provisions of the constitution and laws, designed to secure the liberty and personal rights of all persons within its limits and entitled to the protection of the laws.

That though by the laws of a foreign state, meaning by " foreign," in this connection, a state governed by its own laws, and between which and our own there is no dependence one upon the other, but which in this respect are as independent as foreign states, a person may acquire a property in a slave, such acquisition, being contrary to natural right, and effected by the local law, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of this State, such general right of property cannot be exercised or recognized here.

That, as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer ; that this rule applies as well to blacks as whites, except in the case of fugitives, to be afterwards considered ; that if such persons have been slaves, they become free, not so much because any alteration is made in their *status*, or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention or forcible removal.

That the law arising from the comity of nations cannot ap-
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ply ; because if it did, it would follow as a necessary consequence, that all those persons, who, by force of local laws, and within all foreign places where slavery is permitted, have acquired slaves as property, might bring their slaves here, and exercise over them the rights and power which an owner of property might exercise, and for any length of time short of acquiring a domicile ; that such an application of the law would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible.

Whether, if a slave, voluntarily brought here and with his own consent returning with his master, would resume his condition as a slave, is a question which was incidentally raised in the argument, but is one on which we are not called on to give an opinion in this case, and we give none. From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, and there is no law to warrant his forcible arrest and removal, it would seem to follow as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the state where he is held as a slave, his condition is not changed.

In the case of *The Slave, Grace*, 2 Haggard's Adm. R. 94, this question was fully considered by Sir *William Scott*, in the case of a slave brought from the West Indies to England, and afterwards voluntarily returning to the West Indies ; and he held that she was reinstated in her condition of slavery.

A different decision, I believe, has been made of the question in some of the United States ; but for the reasons already given, it is not necessary to consider it further here.

The question has thus far been considered as a general one, and applicable to cases of slaves brought from any foreign state or country ; and it now becomes necessary to consider how far this result differs, where the person is claimed as a slave by a citizen of another State of this Union. As the several States, in all matters of local and domestic jurisdiction are sovereign, and independent of each other, and regulate their own policy by their own laws, the same rule of comity applies to them on these subjects as to foreign states, except so far as the respective rights and duties of the several States,

and their respective citizens, are affected and modified by the constitution and laws of the United States.

In *art.* 4, § 2, the constitution declares that no person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

The law of congress made in pursuance of this article provides, that when any person held to labor in any of the United States, &c. shall escape into any other of the said States or Territories, the person entitled, &c. is empowered to arrest the fugitive, and upon proof made that the person so seized, under the law of the State from which he or she fled, owes service, &c. Act of February 12, 1793, c. 7, § 3.

In regard to these provisions, the Court are of opinion, that as by the general law of this Commonwealth, slavery cannot exist, and the rights and powers of slave owners cannot be exercised therein; the effect of this provision in the constitution and laws of the United States, is to limit and restrain the operation of this general rule, so far as it is done by the plain meaning and obvious intent and import of the language used, and no further. The constitution and law manifestly refer to the case of a slave escaping from a State where he owes service or labor, into another State or Territory. He is termed a fugitive from labor; the proof to be made is, that he owed service or labor, under the laws of the State or Territory *from which he fled*, and the authority is given to remove such fugitive to the State *from which he fled*. This language can, by no reasonable construction, be applied to the case of a slave who has not fled from the State, but who has been brought into the State by his master.

The same conclusion will result from a consideration of the well known circumstances under which this constitution was formed. Before the adoption of the constitution, the States were to a certain extent, sovereign and independent, and were in a condition to settle the terms upon which they would form a more perfect union. It has been contended by some over-zealous philanthropists, that such an article in the constitution

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could be of no binding force or validity, because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. It has already been shown, that slavery is not contrary to the laws of nations. It would then be the proper subject of treaties among sovereign and independent powers. Suppose instead of forming the present constitution, or any other confederation, the several States had become in all respects sovereign and independent, would it not have been competent for them to stipulate by treaty that fugitive slaves should be mutually restored, and to frame suitable regulations, under which such a stipulation should be carried into effect? Such a stipulation would be highly important and necessary to secure peace and harmony between adjoining nations, and to prevent perpetual collisions and border wars. It would be no encroachment on the rights of the fugitive; for no stranger has a just claim to the protection of a foreign state against its will, especially where a claim to such protection would be likely to involve the state in war; and each independent state has a right to determine by its own laws and treaties, who may come to reside or seek shelter within its limits, and to prescribe the terms. Now the constitution of the United States partakes both of the nature of a treaty and of a form of government. It regards the States, to a certain extent, as sovereign and independent communities, with full power to make their own laws and regulate their own domestic policy, and fixes the terms upon which their intercourse with each other shall be conducted. In respect to foreign relations, it regards the people of the States as one community, and constitutes a form of government for them. It is well known that when this constitution was formed, some of the States permitted slavery and the slave-trade, and considered them highly essential to their interest, and that some other States had abolished slavery within their own limits, and from the principles deduced and policy avowed by them, might be presumed to desire to extend such abolition further. It was therefore manifestly the intent and the object of one party to this compact to enlarge, extend and secure, as far as possible, the rights and powers of the owners of slaves, within their own limits, as well as in other States, and of the other party to limit and restrain them.

Under these circumstances the clause in question was agreed on and introduced into the constitution ; and as it was well considered, as it was intended to secure future peace and harmony, and to fix as precisely as language could do it, the limit to which the rights of one party should be exercised within the territory of the other, it is to be presumed that they selected terms intended to express their exact and their whole meaning ; and it would be a departure from the purpose and spirit of the compact to put any other construction upon it, than that to be derived from the plain and natural import of the language used. Besides, this construction of the provision in the constitution, gives to it a latitude sufficient to afford effectual security to the owners of slaves. The States have a plenary power to make all laws necessary for the regulation of slavery and the rights of the slave owners, whilst the slaves remain within their territorial limits ; and it is only when they escape, without the consent of their owners, into other States, that they require the aid of other States, to enable them to regain their dominion over the fugitives.

But this point is supported by most respectable and unexceptionable authorities.

In the case of *Butler v. Hopper*, 1 Wash. C. C. Rep. 499, it was held by Mr. Justice *Washington*, in terms, that the provision in the constitution which we are now considering, does not "extend to the case of a slave voluntarily carried by his master into another State, and there leaving him under the protection of some law declaring him free." In this case, however, the master claimed to hold the slave in virtue of a law of Pennsylvania, which permitted members of congress and sojourners, to retain their domestic slaves, and it was held that he did not bring himself within either branch of the exception, because he had, for two years of the period, ceased to be a member of congress, and so lost the privilege ; and by having become a resident could not claim as a sojourner. The case is an authority to this point, that the claimant of a slave, to avail himself of the provisions of the constitution and laws of the United States, must bring himself within their plain and obvious meaning, and they will not be extended by construction ; and that the clause in the constitution is confined to the

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case of a slave escaping from one State, and fleeing to another.

But in a more recent case, the point was decided by the same eminent judge. *Ex parte Simmons*, 4 Wash. C. C. R. 396. It was an application for a certificate under § 3, of the act of February 12, 1793. He held that both the constitution and laws of the United States apply only to fugitives, escaping from one State and fleeing to another, and not to the case of a slave voluntarily brought by his master.

Another question was made in that case, whether the slave was free by the laws of Pennsylvania, which, like our own in effect, liberate slaves voluntarily brought within the State, but there is an exception in favor of members of congress, foreign ministers and consuls, and *sojourners* : but this provision is qualified as to sojourners and persons passing through the State, in such manner as to exclude them from the benefit of the exception, if the slave was retained in the State longer than six months. The slave in that case having been detained in the State more than six months, was therefore held free.

This case is an authority to this point ; — the general rule being, that if a slave is brought into a State where the laws do not admit slavery, he will be held free, the person who claims him as a slave under any exception or limitation of the general rule, must show clearly that the case is within such exception.

The same principle was substantially decided by the state court in the same State in the case of *Commonwealth v. Holloway*, 2 Serg. & Rawle, 305. It was the case of a child of a fugitive slave, born in Pennsylvania. It was held, that the constitution of the United States was not inconsistent with the law of Pennsylvania ; that as the law and constitution of the United States did not include the issue of fugitive slaves in terms, it did not embrace them by construction or implication. The court considers the law as applying only to those who *escape*. Yet by the operation of the maxim which obtains in all the States wherein slavery is permitted by law, *partus sequitur ventrem*, the offspring would follow the condition of the mother, if either the rule of comity contended for applied, or if the law of the United States could be extended by construction.

The same decision has been made in Indiana. 3 American Jurist, 404.

In Louisiana, it has been held, that if a person with a slave, goes into a State to reside, where it is declared that slavery shall not exist, for ever so short a time, the slave *ipso facto* becomes free, and will be so adjudged and considered afterwards in all other States; and a person moving from Kentucky to Ohio to reside, his slaves thereby became free, and were so held in Louisiana. This case also fully recognizes the authority of States to make laws dissolving the relation of master and slave; and considers the special limitation of the general power, by the federal constitution, as a forcible implication in proof of the existence of such general power. *Lunsford v. Coquillon*, 14 Martin's Rep 403.*

And in the above cited case from Louisiana, it is very significantly remarked, that such a construction of the constitution and law of the United States can work injury to no one, for the principle acts only on the willing, and *volenti non fit injuria*.

The same rule of construction is adopted in analogous cases in other countries, that is, where an institution is forbidden, but where for special reasons and to a limited extent such prohibition is relaxed, the exemption is to be construed strictly, and whoever claims the exemption, must show himself clearly within it, and where the facts do not bring the case within the exemption, the general rule has its effect.

By a general law of France, all persons inhabiting or being within the territorial limits of France are free. An edict was passed by Louis XIV. called "Le Code Noir," respecting slavery in the colonies. In 1716, an edict was published by Louis XV., concerning slavery in the colonies, and reciting among other things, that many of the colonists were desirous of bringing their slaves into France, to have them confirmed in the principles of religion, and to be instructed in various arts

* *Marie Louise v. Marot et al.* 9 Curry's (Louisiana) R. 473. "The fact of a slave being taken to the kingdom of France or other country, by the owner, where slavery or involuntary servitude is not tolerated, operates on the condition of the slave and produces immediate emancipation. Where a slave becomes free by the laws of another country or state to which he is taken by the owner, it is not in the power of the latter ever again to reduce him to slavery." See also *Nancy Jackson v. Bullach* 12 Connect. R. 38, *Julia v. McKinney*, 3 Missouri R. 270.

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and handicrafts, from which the colonists would derive much benefit on the return of the slaves, but that many of the colonists feared that their slaves would pretend to be free on their arrival in France, from which their owners would sustain considerable loss, and be deterred from pursuing an object at once so pious and useful. The edict then provides a series of minute regulations to be observed, both before their departure from the West Indies, and on their arrival in France, and if all these regulations are strictly complied with, the negroes so brought over to France shall not thereby acquire any right to their freedom, but shall be compellable to return; but if the owners shall neglect to comply with the prescribed regulations, the negroes shall become free, and the owners shall lose all property in them. 20 Howell's State Trials, 15, note.

The constitution and laws of the United States, then, are confined to cases of slaves escaping from other States and coming within the limits of this State without the consent and against the will of their masters, and cannot by any sound construction extend to a case where the slave does not escape and does not come within the limits of this State against the will of the master, but by his own act and permission. The provision is to be construed according to its plain terms and import, and cannot be extended beyond this, and where the case is not that of an escape, the general rule shall have its effect. It is upon these grounds we are of opinion, that an owner of a slave in another State where slavery is warranted by law, voluntarily bringing such slave into this State, has no authority to detain him against his will, or to carry him out of the State against his consent, for the purpose of being held in slavery.

This opinion is not to be considered as extending to a case where the owner of a fugitive slave, having produced a certificate according to the law of the United States, is *bonâ fide* removing such slave to his own domicil, and in so doing passes through a free State; where the law confers a right or favor, by necessary implication it gives the means of enjoying it. Nor do we give any opinion upon the case, where an owner of a slave in one State is *bonâ fide* removing to another State where slavery is allowed, and in so doing necessarily passes

through a free State, or where by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary. Our geographical position exempts us from the probable necessity of considering such a case, and we give no opinion respecting it.

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The child who is the subject of this *habeas corpus*, being of too tender years to have any will or give any consent to be removed, and her mother being a slave and having no will of her own and no power to act for her child, she is necessarily left in the custody of the law. The respondent having claimed the custody of the child, in behalf of Mr. and Mrs. Slater, who claim the right to carry her back to Louisiana, to be held in a state of slavery, we are of opinion that his custody is not to be deemed by the Court a proper and lawful custody.

Under a suggestion made in the outset of this inquiry, that a probate guardian would probably be appointed, we shall for the present order the child into temporary custody, to give time for an application to be made to the judge of probate.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF BERKSHIRE, SEPTEMBER TERM 1836,
AT LENOX.

PRESENT:

HON. LEMUEL SHAW,	CHIEF JUSTICE,	
HON. SAMUEL PUTNAM,		}
HON. SAMUEL S. WILDE,		
HON. MARCUS MORTON,		
		JUSTICES.

JOHN HAYWOOD Petitioner, &c. *versus* **JOHN MAIN**
et al.

Under *St. 1833, c. 50, § 2*, a petition for a new trial presented by a citizen of an other State, after that statute went into operation, must be indorsed by some responsible citizen of this Commonwealth, although the action was tried before the passage of that statute, and the 6th section thereof provides, that it "shall not affect any rights and liabilities" existing under the provisions of law; and this Court is not authorized to grant the petitioner leave to furnish an indorser after such petition shall have been entered, for the statute being peremptory that it shall be indorsed, the provision in Revised Stat. c. 90, § 10, that this Court may in all cases require an indorser, does not apply.

At the October term of the Court of Common Pleas in 1832, this action was tried, and a verdict was rendered against the petitioner. At the May term of this Court in 1833, he presented a petition for a new trial. Notice of the petition was not served until 1835, and at May term 1836, the respondent moved, that the petition be dismissed, because the peti-

tioner resided in the State of New York, and the petition was not indorsed, in conformity with *St.* 1833, c. 50, § 2, (which statute went into operation before the May term 1833,) by some responsible person who was an inhabitant of this Commonwealth. This motion was sustained by *Wilde J.* The petitioner thereupon excepted; and also moved for leave to furnish an indorser, which motion was overruled.

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Bishop and *Whiting*, for the petitioner.

Sept. 20th.

Hall and *Sumner*, for the respondent.

SHAW C. J. delivered the opinion of the Court. The statute of 1833 is peremptory, requiring an indorser when the petitioner is not an inhabitant of this Commonwealth. The proviso in the 6th section, saving cases where rights and liabilities were established, applies not to cases where a right to file a petition existed, but rights and liabilities arising under writs and petitions pending when the act went into operation in May, 1833. This petition being filed after that time, it fell within the rule and was not saved by the proviso, and therefore the petition cannot be sustained.

Sept. 22d.

The provision, Revised Stat. c. 90, § 10, authorizing the Court in all cases to require an indorser does not apply, because, in the case of a petitioner from out of the State, the statute is imperative.

The Court are all of opinion, that the order to dismiss the petition for want of an indorsement, was right and must be affirmed.



JONATHAN C. STEVENS *versus* DEWITT CURTIS, Administrator.

IN this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion.

Sept. 23d.

COMMONWEALTH *versus* JOHN P. JORDAN.

A person licensed as an innholder, common victualler, and retailer, under *St. 1832, c. 166, § 8*, [Revised Stat. *c. 47, § 21*,] which provides, that the county commissioners may license persons "as innholders, common victuallers, or retailers or sellers of wine, beer, ale, cider, or any other fermented liquor," is not authorized, in virtue of his capacity of an innholder and retailer under such license, to sell spirituous liquors.

THIS was an indictment against the defendant for selling mixed spirituous liquor, to be drunk in his house in Williamstown, against the provisions of *St. 1832, c. 166*.

At the trial in the Court of Common Pleas, before *Strong J.*, the defendant admitted that he sold the liquor as set forth in the indictment, but contended that he had a right so to do, by virtue of a license granted to him under *St. 1832, c. 166*, the 8th section of which provides, that the county commissioners may license as many persons "as they shall decide the public good shall require, as innholders, common victuallers, or retailers or sellers of wine, beer, ale, cider, or any other fermented liquor, and no excise or fee shall be required therefor."

The defendant was licensed as a taverner, innholder, common victualler and retailer of wine, &c., and by the order of the commissioners no fee was charged. The judge ruled, that he was not authorized by such license to sell spirituous liquors.

The jury returned a verdict of guilty; and the defendant excepted to the ruling of the judge.

Sept. 22d. *Dwight and Briggs*, for the defendant.

C. A. Dewey, (District Attorney,) for the Commonwealth.

Sept. 23d. *SHAW C. J.* delivered the opinion of the Court. The 8th section of the statute of 1832, provides for a new class of licensed houses, authorizing licensed persons to be innholders, with liberty to sell wine, beer, ale, and other fermented liquors; such license does not make it lawful for such innholders to sell brandy, rum, or other spirituous liquors. The various provisions of the statute imposing penalties on innholders for suffering persons to drink to excess in their houses, and implying a right to sell spirituous liquors, are to be construed by the maxim *reddenda singula singulis*, and to be confined to that class of innholders, licensed under the first section, who are

authorized to sell rum, brandy, and other spirituous liquors. In this way all the clauses of the statute will have their proper meaning and effect.

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The license produced by the defendant is a license under the 8th section of the statute, and did not justify him in selling rum by retail.

Exceptions overruled.

ABRAHAM VAN DEUSEN *et al.* versus JAMES BLUM
et al.

A contract under seal was executed by the plaintiffs, of the one part, and by B, for himself and his copartner T, (but without authority from T,) in the partnership name, of the other part, for a purpose within the scope of the partnership, namely, the erection of a dam for the company, and the plaintiffs thereupon provided the materials and built the dam, but did not finish it until after the partnership was dissolved. It was *held*, that T was not liable on the sealed instrument, but that as the supposed contract which the plaintiffs undertook to perform, between themselves and the company, had no existence, he was liable upon an implied promise for the work performed and materials furnished before the dissolution of the partnership.

THIS was an action of *debt*. The declaration contained two counts upon a special contract under seal, a third upon a *quantum meruit* for labor performed, and a fourth upon a *quantum valebant* for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the two first counts he pleaded *non est factum*, and to the third and fourth, *nil debet*.

At the trial, before Morton J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it.

The judge ruled, that the instrument could not go in evidence to the jury as the deed of Thouvenin

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The contract was for building a dam by the plaintiffs for Blum and Thouvenin, across the Housatonic river ; which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that there being an express contract executed by the plaintiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone.

But the judge ruled, that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole Court.

Sept. 21st. *Dwight, Byington, and Tucker*, for the defendant. There being an express contract binding on Blum, the plaintiffs cannot waive it and resort to an implied promise by him and Thouvenin. *Gates v. Graham*, 12 Wendell, 53 ; *White v. Skinner*, 13 Johns. R. 307 ; *Green v. Beals*, 2 Caines's R. 254 ; *Banorgie v. Hovey*, 5 Mass. R. 11 ; *Worthen v. Stevens*, 4 Mass. R. 449 ; *Whiting v. Sullivan*, 7 Mass. R. 107. Where there is a sealed instrument, it merges the simple contract. *Richards v. Killam*, 10 Mass. R. 243 ; *Cooke v. Munstone*, 4 Bos. & Pul. 351 ; *Ward v. Johnson*, 13 Mass. R. 148.

Bishop and Sumner, contra, cited *Smith v. First Congr. Meetinghouse in Lowell*, 8 Pick. 178 ; *Hayward v. Leonard*, 7 Pick. 181 ; *Lloyd v. Archboulde*, 2 Taunt. 324 ; *Reynolds v. Cleveland*, 4 Cowen, 282 ; *Collyer on Partn.* 267 ; *Denton v. Rodie*, 3 Campb. 492.

MORRIS J. delivered the opinion of the Court. Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebant*. 1 Chit. Pl. 107 ; 2 Wms's Saund. 117 b, note ; *Union Cotton Manufactory v. Lobdell*, 13 Johns. R. 462. Hence these counts may well be joined with counts upon a specialty *Smith v. First Congr. Meetinghouse in Lowell*, 8 Pick. 178.

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It was long doubted, whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our Court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same. *Hayward v. Leonard*, 7 Pick. 181 ; *Smith v. First Congr. Meetinghouse in Lowell*, 8 Pick. 178 ; *Munroe v. Perkins*, 9 Pick. 298 ; *Brewer v. Tyringham*, 12 Pick. 547.

The general authority derived from the relation of partnership, does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See *Cady v. Shepherd*, 11 Pick. 400, and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm, might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict

AUSTIN KINNEY, Administrator &c. *versus* ELI
ENSIGN.

Where land was twice mortgaged, and, after condition broken, the mortgager was appointed administrator of the second mortgagee, and returned an inventory in which the debt due from himself was included, it was held, that he was nevertheless entitled, in his capacity of administrator, to redeem as against the assignee of the prior mortgage, who had purchased the mortgager's equity of redemption, the taking out of administration not being deemed, in respect to such assignee, a payment of the debt due to the second mortgagee, and an extinguishment of the mortgage.

THIS was a bill in equity, to redeem land under a mortgage. The bill sets forth, that the plaintiff, being seised of certain parcels of land in Sheffield, conveyed the same in mortgage, by deed dated the 2d of September, 1824, (and recorded on the 3d,) to Albert A. Root, since deceased, as security for the payment of a promissory note for the sum of \$156.21; that by another deed of mortgage, dated the 24th of August, 1824, (but not recorded until the 16th of September,) the plaintiff conveyed the same parcels to his intestate, Parley Kinney, to secure the payment of a promissory note for the sum of \$623.15; that on March 24th, 1830, Parley Kinney entered for condition broken, and remained in possession until his decease on March 15th, 1833; that the plaintiff, as his administrator, continued the possession until the day of the date of the bill; that by force thereof, Parley, in his lifetime, and the plaintiff, as his administrator, became seised of the right in equity to redeem such real estate from the mortgage made by the plaintiff to Albert A. Root; that on February 11th, 1833, Robert F. Barnard and Robert R. Root, the executors of Albert A. Root, sued out a writ against the plaintiff, demanding possession of the premises by virtue of the mortgage to Root, and such proceedings were had, that at the September term 1834, of this Court, the executors recovered a judgment, conditioned, that unless the plaintiff, in his personal capacity and as administrator, should pay to such executors the sums due on the mortgage and the costs of suit, within sixty days from September 18th, 1834, such executors should have seisin and possession of the premises; that on

November 18th, 1834, the executors of Albert A. Root assigned the land mortgaged, and the deed of mortgage, to the defendant ; that on the 17th of the same November, before the expiration of sixty days from the rendition of such judgment, the plaintiff deposited in the office of the clerk of this Court the amount of the judgment, with interest, for the benefit of the defendant or such executors, in full satisfaction thereof ; that the executors and the defendant refused to accept the same, and on the 19th of the same month, sued out a writ of possession on the same judgment, which was executed, and possession of the premises delivered to the defendant by virtue thereof ; that the plaintiff, as administrator, on April 23d, 1835, in order to redeem the premises from the defendant, tendered to him the sum of \$ 315 in full satisfaction of the mortgage, costs, &c. and requested the defendant to deliver up the possession of the land and execute a deed of release thereof to him as administrator ; but that the defendant refused so to do, and wholly denied the right of redemption to the plaintiff.

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The answer set forth, that at the time of the execution of the mortgage deeds and for five years or more afterwards, the plaintiff was in the open and exclusive occupation of the premises ; that Albert A. Root, as the defendant believes, never had, in his lifetime, any knowledge of the mortgage to Parley Kinney ; that Parley Kinney never gave to the defendant, or to the executors of Albert A. Root, notice of any entry by him for the purpose of foreclosing ; that the plaintiff took out letters of administration on Parley Kinney's estate on July 2d, 1833, and, having given bond to the judge of probate, with two sureties, for the faithful discharge of such trust, on the 12th day of November following presented to the appraisers of the intestate's estate the note secured by the mortgage to the intestate, amounting at that time to the sum of \$ 1040-69, as a debt due to such estate ; that this note was so appraised and included by them in the inventory of the estate ; that the plaintiff caused such inventory to be returned into the probate office, and made oath before the judge of probate, that it was a true and perfect inventory of his intestate's estate so far as the same had come to his knowledge ; that by force thereof such

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debt became assets in his hands, as administrator, and the mortgage deed became void and of no further effect; and that the defendant refused to receive the sum of \$ 315 tendered to him on April 23d, 1835, because he had purchased the plaintiff's right in equity to redeem the lands included in the two mortgages at two sheriff's sales, made on January 17th, 1829, and August 22d, 1831, respectively, and the same has been duly conveyed to him, but the sums paid by him therefor had never been offered or repaid to him.

It appeared that the mortgage to Root covered a parcel of land not included in the mortgage to the intestate.

Sept. 21st. *Hall and Sumner*, for the plaintiff, cited *Bacon v. Fairman*, 6 Connect. R. 121; *Flud v. Rumcey*, Yelv. 160; *Trowbridge's Reading*, 8 Mass. R. 554.

C. A. Dewey and Barnard, for the defendant, cited *Hobart v. Stone*, 10 Pick. 220; *Winship v. Bass*, 12 Mass. R. 199; *Ritchie v. Williams*, 11 Mass. R. 50; *Stevens v. Gaylord*, 11 Mass. R. 266.

Sept. 24th. SHAW C. J. delivered the opinion of the Court. Some difficulty in understanding this case arises from the circumstance, that Austin Kinney stands in the double capacity of original mortgager and administrator of Parley Kinney, one of the mortgagees.

The material facts are thus stated:—In August, 1824, Austin Kinney was seised of the premises, and on the 24th of August, 1824, he mortgaged the same to Parley Kinney, to secure payment of \$ 623.15, which deed was recorded on the 16th of September, 1824. Austin Kinney mortgaged the same premises, with another parcel of land, to Albert A. Root, by deed dated the 2d of September, 1824, recorded on the 3d of September, 1824. This latter deed, though subsequent to that given to Parley Kinney, being taken without notice of the prior deed, and recorded before it, has precedence of it in point of law.

It further appears, that, in 1829, the right of redemption of Austin Kinney was sold by a deputy sheriff, and purchased by Ensign, the respondent. On the 18th of November, 1834, Barnard and Root, executors of the will of Albert A. Root, who had deceased, assigned the mortgage of Kinney to Root

above stated to the defendant, Ensign, said Barnard and Root, as such executors, having first obtained a conditional judgment against Austin Kinney upon this mortgage.

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Some facts are stated respecting Parley Kinney's entry for condition broken in March, 1830, and holding to the time of his death, a little short of three years ; but we do not deem them material in this case.

The entry of Parley Kinney might be good as against Austin Kinney, and operate as a foreclosure against him, but it could not affect Root, a prior mortgagee, because both Austin and Parley Kinney held subject to Root's mortgage. If Parley's entry for condition broken, was good, and the mortgage was thereby foreclosed, then by a principle adopted in this Commonwealth, the mortgaged property vested absolutely in Parley Kinney and his heirs, and the value of the land went in discharge of the debt secured by the mortgage, so that the principal of constructive payment, by taking administration, would not apply. But we have not thought it necessary to determine whether the mortgage of Parley Kinney was thus foreclosed, and we do not place the decision upon that ground ; and we forbear expressing any opinion on the subject, as it may affect parties not now before the Court, and rights not in controversy in this suit. The only question now is, whether the plaintiff has a right to redeem.

The Court are opinion, that the plaintiff is entitled to redeem in his representative capacity, acting under an authority cast upon him by law, for the use and benefit of the creditors and heirs of Parley Kinney.

The point mainly relied on for the defendant is, that Austin Kinney, the plaintiff, being himself debtor on the personal security for which this mortgage was given, when he became administrator of the estate of his creditor, he became liable to account for this debt in his administration account ; that the sureties on his administration bond, being responsible for his whole administration account, would be responsible for such debt, and so the debt was to be considered as absolutely paid and extinguished and the mortgage thereby *de facto* discharged.

But in equity this ground cannot be maintained. It may be remarked, in passing, that if these circumstances must be con-

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strued to amount to constructive payment, it would not necessarily follow, that the mortgage would be thereby absolutely discharged. Payment after condition broken does not of itself revert the mortgaged estate in the mortgager. But the true and substantial ground is, that the taking of administration by the debtor, is not in fact or in law, to all purposes, payment of the debt; as between the administrator himself, and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show, that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well settled rule of strict law, that although a party is bound by an estoppel, as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred. *Monumoi v. Rogers*, 1 Mass. R. 159. So in pleading, a party is held to admit all facts not traversed; but it is only for the determination of the issue in which such pleadings terminate. Such admission cannot be used elsewhere as a fact from which other facts may be inferred. Or, the holding the fact of a debtor taking administration upon the estate of his creditor, to be a payment, may be deemed a legal fiction, adopted for purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice; but such a legal fiction will never be allowed to go so far as to work wrong and injustice.

In the present case there is no necessity to consider Austin Kinney's debt to Parley, as paid by his taking administration. Even though it might be a right on the part of the creditors and heirs of Parley to require Austin, the administrator, to credit his debt in his administration account, they were not bound to do so; it was a right they might waive. In point of fact it has not been so accounted for. Indeed, it would have been highly inequitable to do so, when the effect would probably be to charge the sureties of the administrator with the amount, and to give the whole benefit to the respondent, who had pur-

chased the equity of redemption at a sheriff's sale, subject to this very mortgage.

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If this mortgage debt was not to all purposes paid and discharged, then this administrator, acting in a purely representative capacity, may as well have this right to redeem as any other, there being no occasion to bring any suit against himself. The proceeding affects the mortgaged premises only, which he may as well conduct, as any other representative. I think a case is mentioned in the old books, where a man gave a bond to a religious sole corporation, say to the prior of a convent, and afterwards entered into religion himself, and thereby became *civiliter mortuus*, and administration was taken on his estate. Having become prior of the same convent, he brought an action against the administrator, upon his own estate on his own bond, and recovered. It goes to show how far a representative character will be regarded, and the rights and obligations attaching to it followed, when it can be done without injustice and without disturbing any just rights.

In the present case, the complainant is in a situation to do just what any other administrator would do, as if he were not himself the original mortgager. On redemption he will be put into possession of the estate; but he will hold in *auter droit*; his seisin and possession will be according to his title, and that will be, and will appear by the record to be, in his representative capacity. Then there are express statute provisions, that the estate recovered shall be held to the use of the heirs of the intestate mortgagee, and the administrator shall have a license to sell, if necessary, for the payment of debts

**The President, &c. of the ADAMS BANK *versus*
HUMPHREY ANTHONY.**

Where the holder of two notes made by the same promisor commenced an action against him, declaring on the common counts for a sum greater than the amount of the two notes, and attached property sufficient to satisfy both, but did not intend to include in the action one of the notes, which was signed by a surety, and there were subsequent attachments of the same property by other creditors, it was *held*, that the plaintiff was not bound to comply with the request of the surety, to put into the action the note signed by the surety.

Whether by so doing the plaintiff would not commit a fraud upon the other attaching creditors which would deprive him of the benefit of his attachment, *quære*.

Held also, that an offer of indemnity for so doing, by the surety, would not vary the obligations and duties of the plaintiff.

ASSUMPSIT, on the common money counts, for 3,000 dollars.

At the trial, before *Wilde J.*, the plaintiffs produced in support of the action, a promissory note, dated the 17th of January, 1833, in which the firm of Anthony & Wadsworth, as principals, and the defendant as surety, jointly and severally promised to pay the plaintiffs, or their order, 2,000 dollars, in four months. Anthony, the partner of Wadsworth, was John Anthony, a son of the defendant. On the back of the note were the following indorsements:—“Received May 10, 1833, \$334·85, to take effect from the 20th of May.”—“Received \$34·85, Sept. 23, 1833.” The execution of the note was admitted, and the plaintiffs there rested their case.

The defendant introduced the record of a suit brought by the plaintiffs against Anthony & Wadsworth. The writ in that suit was dated the 12th of July, 1833, and contained the common money accounts, the *ad damnum* being laid at 6,000 dollars. A private attachment was made upon it on the same day, on real estate of John Anthony, worth much more than \$6,000. Judgment was rendered for the plaintiffs in that suit, for \$2,230, on another note against Anthony & Wadsworth, on which one Hoxie was surety.

The defendants also introduced the record of an action brought by Hoxie against Anthony & Wadsworth, in which the same real estate was attached to a large amount, on the 11th of July, 1833. Judgment was rendered against Hoxie

on a nonsuit, at May term 1836, on the day of the trial of the present action.

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Soon after the attachment by the plaintiffs the same property was attached by other creditors of Anthony & Wadsworth.

It appeared that John Anthony and Wadsworth failed in business in the summer of 1833, and had been insolvent and without property ever since.

The cashier of the bank testified, that he made the writ against Anthony & Wadsworth, and that he did not intend to include in it the note on which the present defendant was surety; that he had a general intention to sue all demands against Anthony & Wadsworth that were due, but that he did not then suppose this note to be due; and that his reasons for this opinion were, that on the 10th of May, 1833, the defendant paid \$334.85, saying he wished the note to lie four months longer, to which the cashier assented, and with the consent of the defendant the indorsement of that date was made upon the note, and on the 23d of September, 1833, the defendant paid \$34.95 more, saying the same thing as before, to which the cashier assented, and, with the defendant's consent, made the second indorsement. The witness did not know whether the defendant, at the time of the last payment, was aware of the plaintiffs' attachment, but it had previously been talked of about town.

The defendant offered to prove that the transactions between him and the cashier did not amount to an agreement on the part of the bank to forbear exacting payment for four months, but as the judge was of opinion that, on the testimony of the cashier alone, the bank could legally commence an action on this note at any time after the 20th of May, 1833, the evidence was excluded.

It was testified, that the defendant, in the autumn of 1834, requested the plaintiffs to include this note in their action against Anthony & Wadsworth, and offered to indemnify them against all the consequences of so doing; that the plaintiffs promised to include this note, provided their counsel (Mr. Putnam) should be satisfied that the attachment in the action by Hoxie would be discharged; that John Anthony, in behalf of the defendant, went with Mr. Putnam to the lodgings of Mr. Whiting, the counsel of John Anthony, and stated to him

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this agreement ; that Mr. Whiting assured Mr. Putnam, that he had in his hands an instrument which would discharge Hoxie's attachment, and gave his word that that attachment should be released, if the proposed arrangement between the present parties should be made ; and that Mr. Putnam said he was perfectly satisfied. The cashier testified, that he told the defendant, " that he did not believe this note was due, and that if it were included in their previous action it would be a fraud upon other creditors ; that if the defendant would pay this note and also the note on which Hoxie was surety, he might take the suit and do what he would with it ; and that he need not pay the money, but might give his own note for the two, and on such time as he might choose, and then take the control of the suit ; " that the defendant did not accede to this proposition ; that he told the defendant, that if he would satisfy the plaintiffs' counsel, Mr. Putnam, so that he would advise them that it was safe to put this note into the former suit, he would agree to put it in ; that Mr. Putnam afterwards said, " he was satisfied for himself, but the plaintiffs might do as they thought best ; he would not advise them about it ; " that the witness then told the defendant, that the plaintiffs would do nothing about it, but that he did not tell him the reason ; that the sole reason was, because Mr. Putnam had not seen the release of Hoxie's demand. On further examination he said, that there was also a question, whether they had a right to include this note in the former suit.

The plaintiffs alleged, that as the declaration in their writ against Anthony and Wadsworth contained only general counts, they had no right to take judgment on any causes of action not intended to be sued, at the time of making their attachment, to the prejudice of subsequent mortgagees or attaching creditors.

The questions of law arising on these facts were reserved for the consideration of the whole Court.

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C. A. Dewey and *D. N. Dewey*, for the plaintiffs. In regard to the rights of a creditor as against a surety, they cited *Baker v. Briggs*, 8 Pick. 129 ; *Hayes v. Ward*, 4 Johns. Ch. R. 129 ; *Hunt v. Bridgham*, 2 Pick. 581 ; *Frye v. Barker*, 4 Pick. 382 ; *Fulton v. Matthews*, 15 Johns. R. 433 ; as to the rights of creditors where attachments are made

on general counts, *Fairfield v. Baldwin*, 12 Pick. 388 ; *Willis v. Crooker*, 1 Pick. 204 ; and as to the duties of sureties, *Beardsley v. Warner*, 6 Wendell, 610 ; *Warner v. Beardsley*, 8 Wendell, 200, *Crane v. Newell*, 2 Pick. 612.

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Hubbard and Alvord, for the defendant. This note was due and might have been put into the former action. *Oxford Bank v. Lewis*, 8 Pick. 458 ; *Blackstone Bank v. Hill*, 10 Pick. 129.

Evidence that it was not intended to be included, was inadmissible, the declaration being sufficient to embrace it. *Hodges v. Holland*, 16 Pick. 395.

The attachment of property being sufficient for the satisfaction of the two notes, and the plaintiffs having voluntarily omitted to take judgment on the one now in suit, the surety is discharged. *Boston Hat Manufactory v. Messinger*, 2 Pick. 223 ; *Baker v. Briggs*, 8 Pick. 129 ; *Parsons v. Briddock*, 2 Vern. 608 ; *Rees v. Berrington*, 2 Ves. jun. 542 ; *Wright v. Morley*, 11 Ves. 22 ; *Ex parte Rushforth*, 10 Ves. 409 ; *Stevens v. Cooper*, 1 Johns. Ch. R. 430 ; *Clason v. Morris*, 10 Johns. R. 524 ; *Hayes v. Ward*, 4 Johns. Ch. R. 123 ; *Commonwealth v. Wolbert*, 6 Binney, 300 ; *Mayhew v. Cricket*, 2 Swanst. 185 ; *Capel v. Butler*, 2 Simons & Stuart, 457 ; *Commonwealth v. Vanderslice*, 8 Serg. & Rawle, 452 ; *Lichtenthaler v. Thompson*, 13 Serg. & Rawle, 157 ; *Finney's Adm. v. Commonwealth*, 1 Rawle, Penr. & Watts, 240 ; *Burrows v. McWhann*, 1 Desauss. 409 ; *Baird v. Rice*, 1 Call, 18 ; *Praed v. Gardiner*, 2 Cox, 86.

The weight of the testimony is, that the plaintiffs agreed to put this note into their former action, provided their counsel should be satisfied, not that it might be done with safety, but that the previous attachment of Hoxie would be removed. He was satisfied, and the plaintiffs are bound by this agreement. The trouble of going to Whiting, and the disclosure of valuable information, were a sufficient consideration for their promise. *Chit. Contr.* 7 ; *Sturlyn v. Albany*, Cro. Eliz. 67 ; *Com. Dig. Action &c. upon Assumpsit*, B 4. If they were not satisfied because the release was not shown, they should have given notice of this objection. The defendant's offer of indemnity imposed on the plaintiffs the duty of including this note. *Bellows v. Lovell*, 5 Pick. 307.

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MORTON J. delivered the opinion of the Court The defendant, though an original promisor, stands in the relation of surety to his co-promisors. This gives him some privileges and advantages which the principals are not entitled to, and subjects the plaintiffs to some duties and obligations which are not due to the principals.

The note in suit was a binding contract on all the makers ; and the only question now is, whether the plaintiffs have done any thing which will discharge the surety. It must be borne in mind, during the investigation, that the principals had become insolvent, and that there was a scramble for their effects by their sureties, indorsers and creditors. Between those different claimants it was not the right or the duty of the plaintiffs to show favor or partiality.

The general principles contended for by the defendant's counsel are undoubtedly correct. There are several acts of the creditor, which, though they might have no effect upon the liability of principals, would discharge sureties. If the creditor releases collateral security for his debt, or discharges an indemnity, or gives time of payment to the principal, or does any other act to the prejudice of the legal rights of the surety, he thereby exonerates the surety. If the creditor has in his hands security or the means of payment, he holds them for the benefit of the surety as well as himself, and if he gives them up, to the injury of the surety, he violates a trust which will discharge him. These principles, which seem to be fully supported by the authorities cited by the defendant's counsel, though found in the code of equity, have been substantially adopted by our courts of law. *The Boston Hat Manufactory v. Messenger*, 2 Pick. 223 ; *Baker v. Briggs*, 8 Pick. 128. But we do not think that the defendant brings himself within them.

When the plaintiffs commenced their former action and made their attachment, it was optional with them to include such and so many of their demands against the principals as they thought proper. They were under no obligation to secure either of their sureties ; and if they secured a part, the others would have no reason to complain. In the defendant's case it would have been a breach of good faith to have sued his note. They had, at his request, implicitly agreed to give a further credit upon it,

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which had not expired when their suit was commenced. And although there had been concluded no perfect and obligatory contract to this effect, yet if they had sued it, without his consent, it would have been dishonorable, if not dishonest. If, therefore, the plaintiffs had specifically described the notes upon which they made their attachment, omitting, as they would have done, the one now in suit, the defendant would have had *l.c.* ground of complaint.

But their declaration was general and broad enough to cover this note. The defendant contends that, upon his request, they were bound to include it in their judgment; and that because they refused to do it he is exonerated from his liability. The plaintiffs, when they commenced their former action, did not *intend* to include this note, and never supposed that it was included. It matters nothing, that their intention was formed upon false reasoning, and that had they known their legal rights they would have come to a different determination. But even if they had known that they were not legally holden to grant the delay to which they had agreed, and for which they had received interest, it is not certain, nor even probable, that they would have disregarded this arrangement with the defendant himself and have sued his note. But it is enough for our present inquiry, that, in fact, their *intention* was not to include it in this writ. Were they afterwards, upon the defendant's request, bound to insert it? We think they were not.

It is at least questionable whether they had a legal right to do it, and whether the introduction of this note into their judgment would not have been a fraud upon the after attaching creditors, which would have avoided their own attachments. The case of *Hodges et al. v. Holland*, 16 Pick. 395, relied upon by the defendant's counsel, scarcely touches this point; but as far as it bears upon it, is adverse to the defendant's argument. In that case there were no subsequent attachments. And this circumstance seems to be relied upon by the Court, and furnishes an inference, that in their opinion, had there been any, it would not have been safe for the plaintiff to give in evidence a demand not originally intended to be included in his writ. We therefore think the plaintiffs acted correctly and wisely in refusing to incur this risk.

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But even if they could have done it without danger to their legal rights, they were under no obligation to do it. And it was alike forbidden by principles of honorable and fair dealing and of impartial justice. It would have been to take advantage of a power which fortuitous circumstances had placed in their hands; to favor one creditor at the expense of others equally meritorious.

Nor did the offer of indemnity by the defendant, in the slightest degree vary the legal or moral obligations and duties of the plaintiffs. Had the indemnity been adequate, the plaintiffs were not bound nor ought they to have acceded to it. And if they did wrong at all in the transaction, it was in their offer to give the defendant the control and management of their suit upon any terms.

No more were they bound by any agreement, to include this note in their judgment. There were proposals made and answers returned, and much negotiation between the parties and an approximation to that union of their minds which constitutes an agreement; but not the actual contact which is necessary to its consummation. But if the agreement had been closed, it would not have been obligatory. Were there no other infirmity, the want of a legal consideration would have been fatal to it.

On the whole, we are perfectly satisfied that the plaintiffs have done nothing in this matter, of which the defendants can rightfully complain; and that he has no legal or equitable defence to this action.

Defendant defaulted.

SHERMAN OSBORN *versus* HENRY ADAMS.

Where an insolvent debtor in Connecticut assigned all his property, including certain land in Massachusetts, in trust for the benefit of his creditors, *pro rata*, under the provisions of a statute of that State, none of the creditors being parties to the assignment, and at the same time conveyed such land to the trustee by a deed which referred to the assignment as to the purposes of the conveyance, and which was duly executed and recorded according to the laws of Massachusetts, it was held, that the statutory assignment in Connecticut was void, in regard to land in Massachusetts, the title to real estate being exclusively subject to the laws of the State where it lies; and that the second deed, being ancillary to the statutory assignment, was without consideration and void as against creditors in Massachusetts, who attached the land after such deed had been recorded.

THE parties stated a case. The demandant claimed title to certain land in New Marlborough, in this county, by virtue of certain proceedings under a statute of Connecticut (*St.* 1828, c. 3, p. 132.) Adonijah C. Powell, the original proprietor of the land, on July 16th, 1833, at Canton in Connecticut, under the provisions of that statute, for a nominal consideration, assigned all his property, including the demanded premises, to the demandant, in trust, for the benefit of all of his creditors, both parties to the deed being described as of Canton. On the same day and in connexion with the assignment, Powell, by another deed also executed in Connecticut, conveyed to the demandant two parcels of land in New Marlborough, which embraced the demanded premises, the deed referring to the general assignment as to the purposes of the conveyance; and the last mentioned deed was, on the same day, duly recorded in the registry of deeds in this county.

It further appeared, that the demandant had not transferred or sold the land, or in any way distributed any avails of the same; and that he was not a creditor of Powell at the time of the assignment in trust.

The tenant claimed under a conveyance from Edward Stevens and other citizens of Massachusetts, who, as creditors of Powell, on July 20th, 1833, attached the premises, for debts long before contracted in Massachusetts. The action in which these attachments were made were entered, and judgments having been recovered therein, the executions were duly levied on the demanded premises. By the Connecticut *St.* 1828,

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c. 3, p. 182, it is provided, that all assignments of real and personal estate by any person in failing circumstances, with a view to his insolvency, to any person or persons, in trust for his creditors, shall, as against the creditors of such assignor, be deemed void, unless made for the benefit of all of such creditors, *pro rata*, and lodged for record in the court of probate ; that such trustees shall give bond to the court of probate, for the faithful performance of their duties ; and that on the complaint of any person interested in the trust, such court may remove any trustee of the property so assigned, on sufficient cause being shown for such removal.

The only question raised between the parties was as to the legal effect of the proceedings which took place on July 16th, 1833.

If upon these facts the Court should be of opinion, that the legal title to the premises was in the demandant, the tenant was to be defaulted ; but if they should be of opinion, that the tenant had the better title, the demandant was to become nonsuit.

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Briggs and Bishop, for the plaintiff. As there is nothing in the statute of Connecticut contravening our laws, the conveyance of the real estate situate in this Commonwealth, in aid of the proceedings under that statute, was valid. Upon the general principles of comity, the law of Connecticut will be respected here, if not repugnant to our own laws. It may be said, that an assignment under a bankrupt law does not operate upon land in a foreign state. But a distinction is taken between assignments under a bankrupt law, and those which are the debtor's own voluntary act. *Holmes v. Remsen*, 4 Johns. Ch. Cas. Rep. 460 ; *S. C.* 20 Johns. C. Rep. 229 ; *Abraham v. Plestoro*, 3 Wendell, 538 ; *Blake v. Williams*, 6 Pick. 286. It is not denied, that in regard to the transfer of real estate, the laws of the place, where it is situate, are to govern. But this means, that the conveyance of it shall be according to the forms required by such laws. In the present case all the formalities required by our laws were complied with.

C. A. Dewey, for the defendant. The title of the demandant rests solely on the second deed, as that alone was recorded, when the attachments under which we claim were made. That deed standing alone is void ; it is a naked case of an assign-

ment by an insolvent debtor, in trust for his creditors, not assented to by any creditor at the time of the attachments. *Widgery v. Haskell*, 5 Mass. R. 144 ; *Stevens v. Bell*, 6 Mass. R. 342 ; *Marston v. Coburn*, 17 Mass. R. 454 ; *Ward v. Lamson*, 6 Pick. 358 ; *Brewer v. Pitkin*, 11 Pick. 298 ; *Russell v. Woodward*, 10 Pick. 408.

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The demandant cannot rely on the proceedings under the statute of Connecticut ; for they constituted a mere statutory transfer, which was inoperative upon real estate in Massachusetts. Story on Confl. of Laws, § 20, 364, 414 ; *McCormick v. Sullivan*, 10 Wheaton, 202 ; *Rogers v. Allen*, 3 Ohio R. 498 ; *Ingraham v. Geyer*, 13 Mass. R. 147. The deed which was recorded, was, upon its face, merely incidental to the general assignment in Connecticut. *Holmes v. Remsen*, 20 Johns. R. 229.

WILDE J. delivered the opinion of the Court. As to the assignment under the statute of Connecticut, it is very clear, that Powell's title to real estate within this Commonwealth could not pass thereby. The title and disposition of real estate is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass. *McCormick v. Sullivan*, 10 Wheaton, 202. This statutory assignment, therefore, in regard to real estate situated in this Commonwealth, is merely void. It can neither pass a title, nor aid one otherwise defective.

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The demandant then must rely solely on his conveyance from Powell, and this, no doubt, would be a valid title against a stranger, or any one not claiming under him. But the tenant claims under the creditors of Powell, who attached the demanded premises in a few days after the conveyance to the demandant ; and these attachments have been perfected by entry of the actions, and judgments duly rendered thereon, and levy of executions, in due form of law. Such being the title of the tenant, it appears to us very clear, that the demandant's title cannot prevail against it. The deed to the demandant was a mere voluntary conveyance. No consideration was paid ; and although the conveyance to the demandant was in trust for Powell's creditors, yet they were not parties to it, and have not discharged their debts. It is admitted, that no

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sale or transfer of the demanded premises has been made by the demandant, nor has he in any way distributed any avails of the same. He was not a creditor, but a trustee only ; and the trust was created by the proceedings under the statute of the State of Connecticut, of which we can take no notice. The conveyance was ancillary to those proceedings, and those being void as against Powell's creditors, it follows conclusively, that there was no consideration on which the conveyance can be maintained against the title derived from those creditors. We can no more take notice of a trust created under a foreign government, than we can, of a will not proved nor recorded in this Commonwealth. And, independent of the proceedings under the statute of Connecticut, the conveyance to the demandant was merely voluntary. According to the agreement of the parties, therefore, he must become nonsuit.

SAMUEL GUNN *et al.* versus GEORGE BUTLER.

By an indenture between a father and his son, the father, in consideration of a sum of money, conveyed his farm to the son, with covenants of warranty, and the son covenanted, that he would support the father when he should be unable to support himself, that he would pay certain legacies, and that the several undertakings in the premises, by him to be performed, should be "considered as a charge and lien" on such real estate, and should "have the effect in law to charge the same real estate, as a mortgage security ;" and the father, during his lifetime, and while he was able to labor, was to have the right to occupy the farm, in the same manner as though the indenture had not existed, and his debts, if he should owe any at his decease, were to be paid out of his personal estate by his son. It was *held*, that, under such indenture, (supposing it valid,) the father had no legal estate in the farm capable of being extended upon by virtue of an execution against him, it not appearing that he had ever entered for condition broken, as upon land under mortgage, or given notice that he held for condition broken.

Held also, that the indenture, as it purports to be made on a pecuniary consideration, and contains onerous stipulations on the part of the grantee, could not be deemed a voluntary conveyance, to be pronounced, *per se*, fraudulent against creditors as matter of law ; but that if no consideration was in fact paid, if it was a conveyance of the whole of the grantor's estate, if he was indebted at the time, and if the conveyance had a tendency to defraud and defeat or hinder the creditors, the deed was fraudulent and invalid as against creditors.

WRIT of entry. Plea, the general issue. Trial before Wilde J.

The demandants claimed by virtue of an indenture made on

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the 13th of December, 1809, and recorded in 1812, between Gideon Gunn and his son, Calvin, who was the father of the demandants. By that indenture, Gideon, in consideration of the sum of \$1200 paid to him by Calvin, conveyed his farm in Pittsfield to Calvin, his heirs and assigns, to hold to his and their own proper use, with covenants of warranty; and Calvin covenanted with Gideon, that whenever the latter and his wife should be unable, or think themselves unable, to support and maintain themselves, Calvin, his heirs &c. should thenceforward, during the life of Gideon and his wife and the survivor of them, or during such term as they or the survivor of them should need such maintenance, or, in case of the wife's surviving, during her widowhood only, furnish them with a suitable maintenance and support, it being understood by the parties, that such rights, credits and personal estate as should appertain to Gideon, should be considered as liable to be applied to such maintenance. The indenture further set forth, that Calvin covenanted with Gideon, that at the expiration of one year after the decease of the latter, he would pay the sum of \$100 to each of the daughters of Gideon, or, in case of their decease, to or for the use of their children, unless Gideon should have paid such sums, or a part thereof, to his daughters, during his lifetime, in which case a corresponding deduction was to be made from the sums to be so paid by Calvin; that Calvin, for himself, his heirs, &c. further covenanted, that the several undertakings and duties in the premises, by him to be performed, should be "considered as a charge and lien on the before granted real estate," that the same should "have the effect in law to charge the same real estate as a mortgage security;" that Gideon, during his life, should have, while he was able to labor and to conduct the operations of agriculture, the right to occupy the real estate, in the same manner as though this indenture had not existed; that the indenture was intended by Gideon, and understood by both parties, to contain all the arrangements for the settlement of Gideon's estate, and was the act that terminated the same; and that Gideon's debts, if he should owe any at his decease, were to be paid by Calvin out of Gideon's personal estate, including his rights and credits.

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The tenant derived his title from the extent of an execution on a part of the real estate above mentioned, made on May 9th, 1821. This execution was issued upon a judgment recovered by the judge of probate in an action brought against Gideon, as the principal in an administration bond, and Timothy Mason, as surety, for the benefit of the heirs of Reuben Gunn. The bond was executed on December 25th, 1798. The tenant, and those under whom he claimed, had been in possession of the real estate in controversy ever since the extent of the execution.

Calvin died in 1813. The demandants were minors at the time of the extent of the execution.

The tenant contended, first, that there had been no valid delivery of the indenture, and secondly, that its legal effect was not to defeat the title derived from the extent of the execution.

Upon the first point, the issue was put to the jury, and their verdict was, that the delivery was valid.

The second point was reserved for the consideration of the whole Court.

If the Court should be of opinion, that the indenture conveyed the land so as to defeat the title under the extent, judgment was to be entered for the demandants; if otherwise, so the tenant.

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Hubbard and Rockwell, for the tenant, to the point, that if the indenture was to be considered as an absolute conveyance by Gideon of all his property, the land in controversy still continued subject to the payment of his debts, cited *Graff v. Smith*, 1 Dallas, 481; 5 Dane's Abr. 49; *Wilson v. Knubley*, 7 East, 128; that if it was to be deemed a mortgage, not only to secure the maintenance of Gideon and his wife and the payment of the legacies, but also the payment of the debts of Gideon, still the extent of the execution was valid, and passed the title to the land extended upon, *Jackson v. Willard*, 4 Johns. R. 41; *Atkins v. Sawyer*, 1 Pick. 351; *Blanchard v. Colburn*, 16 Mass. R. 345; *Trowbridge's Reading*, 8 Mass. R. 554; *Porter v. King*, 1 Greenl. 297; and that it was a voluntary and fraudulent conveyance, which was void as against creditors, *Doe v. Manning*, 9 East, 59; *Russel v.*

Hammond, 1 Atk. 15 ; *Twyne's case*, 3 Co. R. 81 ; *Alderson v. Temple*, 4 Burr. 2241.

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Bishop, Hall and Gold, for the demandants.

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SHAW C. J. delivered the opinion of the Court. The instrument upon which the question arises, between these parties, is a very peculiar one. It was contended on the part of the tenant, who claims under the levy of an execution, on which the estate was set off, in 1821, as the property of Gideon Gunn, that supposing the deed from Gideon to Calvin to be valid, and to have been duly delivered, still Gideon had such an estate in the land as to justify the levy. This claim is founded on that clause in the indenture, in which it was stipulated, that the covenants of Calvin should constitute a charge and lien on the land. Whether the clause would be sufficient to create such lien or *charge*, or whether it would be deemed a declaration of trust to hold for the benefit of all those entitled to beneficial interests in the performance of those covenants, to be enforced in equity, it is not now necessary to decide ; the Court are of opinion, that under that deed, Gideon had no legal estate capable of being levied upon by execution. The most that can be made of the clause in question is, that it was a mortgage back by Calvin, conditioned for the performance of his covenants. It does not appear that Gideon, the father, ever entered for condition broken, or gave notice to hold for condition broken, or otherwise treated the estate as a mortgage.

Then the question is, whether, as against creditors, this conveyance from Gideon to his son was valid. There are, in the provisions of the indenture, circumstances creating a strong suspicion of fraud on creditors, if he was then in debt. He speaks of it as a final settlement of his estate, and yet there being nothing said of the disposal of the \$1200, it leaves room to believe, that the consideration was merely nominal, and not intended to be paid. It has the appearance of being a final disposal of the whole of his property, and most of the stipulations of Calvin are for future provisions for the grantee himself and those dependent on him. Still, however, as it purports to be made on a pecuniary consideration, and contains numerous stipulations on the part of the grantee, it cannot be

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said to be a voluntary conveyance, to be pronounced fraudulent against creditors as matter of law. But if it be true, as it is now stated, that no consideration was in fact paid, that it was a conveyance of the whole of the grantor's estate, that he was indebted at the time, and that the conveyance had a tendency to defraud and defeat or hinder the creditors, a jury should be instructed, upon finding these facts, to find the deed fraudulent against creditors. It was stated, as a consideration tending to rebut the presumption of fraudulent intent as against creditors, that, by the terms of the contract, Calvin stipulated to pay his father's debts, at his decease. This argument fails in several respects ; first, it is only to pay his father's debts out of his, the father's personal property ; there was no provision for the payment of his debts in his lifetime, and the creditors would at least be delayed and hindered in the recovery of their debts. Besides, the rights of creditors are not to be affected by a mere executory contract of the debtor with a third person, to pay the debts for him. This stipulation does not essentially alter the character of the transaction.

This case stands clear of the question, often much discussed, upon fraudulent conveyances, and the effect and construction of the statutes of 13 and 27 *Eliz.*, whether a voluntary settlement will be held void, as well against a creditor of the grantor, becoming a creditor after a conveyance, as against one who was a creditor at the time. In this case, the debt for which the estate was levied on was a debt originating in a bond to the judge of probate, given long before the conveyance of Gideon Gunn to his son Calvin ; against such a creditor, a voluntary conveyance must be held fraudulent and void.

The Court are of opinion, that as the validity of the deed depends upon the question, whether it was given without valuable consideration, or intended to defeat or hinder creditors, and as this is a mixed question of fact and law, it ought to go to a jury, upon a new trial, under instructions in point of law, as hereinbefore stated. The delivery of the deed under which the demandants claim, having been tried and found for them, on the former trial, the verdict is set aside on the terms that, on the new trial, the tenant will not contest, but will admit that fact.

New trial granted.

JARED CANFIELD *versus* DAVID IVES.

Where a joint and several promissory note was executed and left in the hands of M, one of the promisers, to be delivered to the payee, when it should be demanded by him, in exchange for a note for the same amount, but of a previous date, and signed by M alone, and no demand was made therefor by the payee before the death of M, it was *held*, that the new note did not operate *de facto* as a payment of the old note, that the property in such new note had not vested in the payee, and that he could not recover the possession of it from the administrator of M, it being presumed, that the interest which had accrued upon the old note was to be paid upon making the exchange.

TROVER to recover possession of a joint and several promissory note, for the sum of \$ 200, dated December 2, 1833, payable to the plaintiff or his order, on demand, with interest, and signed by Miles Bartholomew, late of Sheffield, deceased, and Frederick H. Bartholomew, his son, who lived in New York.

It appeared, that on the 18th of August, 1831, Miles executed a note of that date, for the sum of \$ 200, payable to the plaintiff, on demand, with interest ; that at some time previous to the 2d of December, 1833, in consequence of the plaintiff's having asked for payment of this note, or security therefor, Frederick called on the plaintiff and offered to give his note jointly with his father in exchange for it ; that the plaintiff acceded to this proposal, and agreed to call on Miles at Great Barrington and make the exchange ; that in pursuance of this arrangement, the note now in controversy was executed by Miles, as principal, and his son, as surety, as the son stated in his deposition, though it was not so expressed in the note ; and that the new note was left with Miles to be delivered to the plaintiff when he should call for it. It further appeared, that Miles had secured and indemnified Frederick by a conditional indorsement upon a note held by him against Frederick ; that the new note not having been demanded by the plaintiff, remained in the hands of Miles until his decease, when it passed into the hands of the defendant, who was the administrator of Miles ; and that after the appointment of the defendant as such administrator, the plaintiff demanded of him the new note, and offered the old note in exchange, but the defendant refused to comply with such demand. This action was thereupon brought against the

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defendant personally, on the ground that his refusal to deliver the note was a conversion of the plaintiff's property.

It was admitted that Miles died insolvent, and that Frederick was able to pay the note in suit.

A nonsuit or default was to be entered, according to the opinion of the Court.

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Hall, for the plaintiff, cited *Jones v. Farley*, 6 Greenleaf, 226; *Shepard v. Hall*, 1 Connect. R. 494; *Camp v. Tompkins*, 9 Connect. R. 545.

Sumner, for the defendant, to the point, that neither Miles nor Frederick could be deemed the agent of the plaintiff, they being parties to the note, cited *Leigh v. Horsum*, 4 Greenleaf, 28.

SHAW C. J. subsequently drew up the opinion of the Court. The single question in this case is, whether the property in the note, which is the subject of the action, had vested in the plaintiff at the time of the demand and refusal. The Court are all of opinion that it had not. The transaction was inchoate and incomplete, and until the exchange was made pursuant to the agreement, the old note was not discharged, nor did the plaintiff become entitled to the right of property in the new one. It was a proposition, an executory agreement, never in fact executed. It is impossible to consider Miles Bartholomew as the agent of the plaintiff; he was himself a promiser and a party, and the same act of delivery which would bind his son would bind him, and till such a delivery as would bind him, his son would not be bound. It was a joint obligation, and must take effect, to bind both at the same moment. He was undoubtedly the agent of his son, authorized to deliver the note for him, and had he so delivered it, pursuant to that authority, the son would have been bound.

Such was the view taken of the case in the first instance, and an opinion was about to be delivered. But the facts were rather imperfectly stated, and a slight doubt arose in the minds of some of the Court, which led to a delay and further inquiry. It was on this ground: it did not appear by the report, in the first instance, what was the date and amount of the old note, for which the new note was to be given in exchange. Now, if the new note was given for the precise amount due on

the old one, that is, for the principal of the old one with the interest computed from the date of the old to that of the new, so that nothing remained to be done, and the new note was, by mutual agreement, left at a particular place for the plaintiff, so that nothing remained but for him to call and take it, — under the rule of law in Massachusetts, that a negotiable note is to be deemed *prima facie* payment of a pre-existing simple contract debt, this new note thus deposited, might be considered as *de facto* payment and satisfaction of the old note, by which it was cancelled and extinguished, and all right of action upon it taken away, and if so, it would follow as a necessary consequence, that the plaintiff must be deemed to have a property in the new note.

But upon comparing the two notes, the fact appears, as at first supposed, but not stated, that the new note was given for the same principal as the old, and that, therefore, there was interest due on the old note, and it is to be presumed, that upon the exchange of the notes, the interest was to be paid. This renders it quite decisive, that independently of the question upon the fact of delivery, it could not have been understood by the parties, that the new note was to enure and operate *de facto*, as payment of the old one, or that the new note was left with Miles Bartholomew for any other purpose than to be exchanged for the old one, that is, to be delivered when the old one should be given up. The further consideration, that the interest was to be paid on the old note, on such exchange, renders it quite clear, that the transaction was not to be understood as closed, so as to vest the property in the new note in the plaintiff, until such exchange, which was never made.

Plaintiff nonsuit.

**TERTULLUS GOFF *versus* CHARLES KELLOGG,
Executor, &c.**

The proper evidence of the rejection of a claim laid before commissioners on an estate represented insolvent, is the report of the commissioners and the acceptance thereof by the Court of Probate ; and notice given of an intention to prosecute a suit at law on such claim, and a suit brought thereon, after the commissioners had in fact rejected the claim, but before their report was returned and accepted, were held to be premature.

ASSUMPSIT for use and occupation. The estate of the defendant's testator having been represented to be insolvent, a commission of insolvency was issued thereon on the 6th of March, 1833, and six months were allowed to creditors to present and prove their claims. The commissioners held their last session on the 6th of September, 1833, when they rejected the claim of the plaintiff. The plaintiff filed a notice in the probate office on the 2d of October, 1833, that he should bring an action at common law, and this action was accordingly commenced on the 18th of October, 1833, the writ being returnable in February, 1834. The report of the commissioners was received, considered, and ordered to be recorded, by the Probate Court, on the 7th of January, 1834.

A verdict was taken for the plaintiff ; and the question, whether the notice was conformable to the *St. 1784, c. 2*, was reserved for the consideration of the whole Court.

Sept. 23d. *Lanckton*, for the defendant, cited *Ellsworth v. Thayer*, 4 Pick. 122.

Gold, for the plaintiff.

Sept. 24th. **SHAW C. J.** delivered the opinion of the Court. By *St. 1784, c. 2*, the notice is to be given by a creditor whose claim is rejected by the commissioners, within twenty days after such rejection. The proper evidence of the rejection of the claim is the return of the report to the probate office, and the acceptance thereof by the Probate Court. This was so held in *Ellsworth v. Thayer*, 4 Pick. 122, and that notice given before the return of the report of the commissioners was premature, and not a compliance with the requisitions of the statute, which is a condition precedent to the maintenance of the action. That case is decisive of the present, against the plaintiff.

Verdict set aside, and, by consent, plaintiff nonsuit.

**ELEANOR CHAPEL *versus* WILLIAM H. CONGDON
*et al.***

A misrecital in the condition of a bastardy bond, of the day on which the obligee made her accusation against the reputed father of the child, does not invalidate the bond.

DEBT on a bond, under *St.* 1785, *c.* 66. The case was tried before *Wilde J.*

It appeared, that on September 14th, 1833, the plaintiff complained to Thomas A. Gold, Esq., setting forth that she was pregnant with a child, which, if born alive, would be a bastard, and accused the defendant, William H. Congdon, of being the father of the child; that Congdon was arrested and brought before Mr. Gold, on September 16th, 1833, and was ordered to give bond, with sufficient sureties, in the sum of \$200, for his appearance at the Court of Common Pleas next to be held at Lenox, for the county of Berkshire, on the fourth Monday of October, 1833, then and there to answer to the accusation and abide the order of the court thereon; that in pursuance of such order the defendants gave a bond dated September 16th, 1833, which is the subject of this action; that on October 24th, 1833, the plaintiff was delivered of the child, and at the October term of the Court of Common Pleas in 1833, entered her complaint; and that the defendant Congdon appeared and contested it.

The condition of the bond contained the following clause: "Whereas the said Eleanor Chapel hath, on her examination on oath, taken before Thomas A. Gold, Esq., justice of the peace within the county of Berkshire, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and *sixteen*, accused the said Congdon of being the father of a bastard child of which she is now pregnant."

The plaintiff was prepared to show that the recital of the date in the condition, was a mistake. The Court were to render such judgment, as, upon the whole case, they should deem conformable to the law.

Briggs and *Bishop*, for the defendant, cited *People v.* *Sept. 23:*

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Chapel v. Congdon. *Munroe*, 3 Wendell, 426 ; *Humphrey v. Watson*, 1 Root, 256 ; 3 Stark. on Evid. 1529.

Dwight, Gold, and Byington, for the plaintiff, cited to the point, that the misrecital in the bond was a clerical error and might be rejected ; *Shrewsbury v. Boylston*, 1 Pick. 105 ; 3 Stark on Evid. 1591 ; *Manly v. United M. & F. Ins. Co.* 9 Mass. R. 89 ; *Colburn v. Downes*, 10 Mass. R. 20 ; that a bond is good, although the condition was impossible at the time of making the obligation, Shep. Touchst. 372 ; that the defendants could not take advantage of the erroneous recital, without praying over and pleading the defect, *Colton v. Goodridge*, 2 W. Bl. 1108 ; and that the Court might look at the intent of the parties to this bond, as in this respect it stood on the same ground as other contracts, *Davis v. Boardman*, 1st Mass. R. 80.

Sept. 24th. PUTNAM J. delivered the opinion of the Court. A mistake, which is obvious to all, has been made by the magistrate in the draught of the bond. If it be in matter of substance, it will be fatal ; if it be only redundant matter of description, which is not necessary to be literally proved, the claim may be supported, if enough remains to establish the identity. The rule is well stated in 3 Stark. on Evid. 1529. "It is a most general rule, that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected." Now the thing which was essential to the plaintiff's claim or accusation was, that William H. Congdon was the father of the child of which the plaintiff was then pregnant, which if born alive would be a bastard. Whatever is essential to the description of that accusation may not be rejected.

But the converse of that proposition would seem to be true, that whatever is set forth which is not essential to the charge, may be rejected. They would be considered as redundant allegations, which may be rejected, and which need not be proved, provided that there be left sufficient allegations and proofs, to maintain the accusation. It would be absurd to hold a party bound to prove what may be wholly rejected from his complaint, leaving nevertheless a sufficient charge to be legally established by competent evidence.

Thus in *Colburn v. Downes*, 10 Mass. R. 20, the plaintiffs alleged that they, "James S. Colburn and William Gill," sued one Burton, and that the defendant became bail, &c. But in the bail bond, the plaintiffs were called John S. Colburn and George W. Gill, but were described as "of Boston, in the county of Suffolk, merchants and copartners in trade jointly negotiating in business, under the firm of Coburn & Gill." It was held to be a sufficient description of the plaintiffs. So in *Shrewsbury v. Boylston*, 1 Pick. 105, it was held, that the wrong date of a statute may be rejected, as surplusage, where the reference is clear without it. And see *Rodman v. Forman*, 8 Johns. R. 27; *Page v. Woods*, 9 Johns. R. 82; *Fowles v. Miller*, 3 Taunt. 137. So in *Judge v. Morgan*, 13 East, 547. In an action for a malicious prosecution, the judgment was recited, "that the plaintiffs should take nothing by their writ, but that they *and their pledges to prosecute*" should go without day. But the record had not the words "*and their pledges to prosecute.*" Held to be an immaterial omission.

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Now this bond was given for the purpose of compelling the principal to appear at the Court of Common Pleas in October, 1833, to answer to the accusation before described. And it is set forth in the accusation, that the party complaining was then pregnant, and that the principal in the bond was the father of the child. The accusation is sufficiently set forth in the condition of the bond, notwithstanding the particular day on which it was made is mistaken, and a time inserted, which is necessarily inconsistent with the fact of existing pregnancy.

The bond is dated on the 16th of September, 1833. Reject the words "in the year of our Lord eighteen hundred and sixteen," (which are, in the condition, recited as the time when the accusation was made,) and there will be still left a sufficient recita of the accusation. It will appear that W. H. Congdon was to appear at the Court of Common Pleas, as above expressed, to answer the accusation which the plaintiff had made against him, of being the father of the bastard child of which she was then pregnant. The day on which she made her accusation is not an essential part of the description of it. It was to that accusation, that the principal was to appear and answer.

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and abide the order of the court thereon. He could not mistake his duty. But he failed to do it; and we all think that the judgment should be entered up against him upon the bond.

SAMUEL D. COLT *et al.* versus PARKER BARNARD.

In the case of a note indorsed after it has become due, the indorser is not liable unless payment be demanded of the maker, and notice of the non-payment given to the indorser; and as such a note has become payable on demand, the demand on the maker must be made within a reasonable time, and immediate notice of non-payment given to the indorser.

ASSUMPSIT. The action was tried before *Morton J.*

The plaintiffs offered in evidence a promissory note signed by one Chester Colt, dated in March 1829, for the sum of \$75, payable to the defendant or his order on June 1st, 1829, and indorsed by the defendant.

It was subsequently admitted, that this note was indorsed by the defendant to the plaintiffs, on the 21st of August, 1829, some time after it had become due; but it did not appear by direct testimony, that any demand of payment had been made on the maker, or that any notice of non-payment had been given to the defendant.

The plaintiffs proved, that at the time when this note was indorsed, the maker was insolvent and had absconded, leaving his family in Pittsfield, where they continued to reside till some time in the autumn of 1829, when he sent for them and removed them into the State of New York; and that about the middle of November, 1829, the note was sent to the State of New York for collection, and that a judgment was there recovered against the maker, but it had not been satisfied.

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Gold, for the plaintiffs, to the point, that if a note is indorsed after it has become due, and the indorser knows that the maker is insolvent and has absconded, notice of the non-payment of the note may be dispensed with, cited *Big. Dig.* 641; *Widgery v. Munroe*, 6 Mass. R. 449; *Putnam v. Sullivan*, 4 Mass. R. 45; *Hale v. Burr*, 12 Mass. R. 86; *Crossen v. Hutchinson*, 9 Mass. R. 205; *Shaw v. Reed*, 12

Pick. 132 ; 2 Stark on Evid. (Am. edit.) 262, note ; *Duncan v. M'Cullough*, 4 Serg. & R. 480 ; *City Bank v. Cutter*, 3 Pick. 414.

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Hubbard and Lunckton, for the defendant, to the point, that a demand and notice of non-payment were indispensable, although the note was indorsed after it had become due, cited *Course v. Shackelford*, 2 Nott & M'Cord, 283 ; *Poole v. Tolleson*, 1 M'Cord, 199 ; *Stockman v. Riley*, 2 M'Cord, 398 ; *Berry v. Robinson*, 9 Johns. R. 121 ; *Dwight v. Emerson*, 2 New Hamp. R. 159 ; *Bishop v. Dexter*, 2 Connect. R. 419 ; *M'Kinney v. Craeford*, 8 Serg. & R. 351 ; *Bond v. Farnham*, 5 Mass. R. 170 ; *Crossen v. Hutchinson*, 9 Mass. R. 205 ; *Sandford v. Dillaway*, 10 Mass. R. 52 ; *Farnum v. Fowle*, 12 Mass. R. 89 ; *Woodbridge v. Brigham*, 13 Mass. R. 559.

SHAW C. J. delivered the opinion of the Court. It is now conceded, that this note was indorsed by the defendant to the plaintiff, some time after it became due, and the question is, whether the action can be maintained against the indorser, without a demand on the promisor and notice of non-payment to the indorser. The Court are of opinion, that the action cannot be maintained, without such demand and notice.

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If the indorser is liable at all, on such indorsement, it is in virtue of the law merchant, which creates a conditional liability to pay, if the maker on presentment shall neglect or refuse to pay, and seasonable notice of such dishonor is given to the indorser. It is very clear, that a promissory note is negotiable after it falls due, as well as before. Each indorsement is in the nature of a new draft, by which the holder orders the maker to pay the contents to the indorsee. It is an implied stipulation with the indorsee, that the money is still due and payable, that the indorser is entitled to so much money, in the hands of the maker, and if the indorsee will call upon the maker he shall receive it. It is like drawing a bill at sight, on which a drawer or indorser cannot be holden without presentment and notice of non-payment. All the reasons, which require a demand and notice, in any case, to charge the indorser, apply to this. There is the same reason for prompt notice,

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namely, that the indorser may take measures to secure payment, if the note is dishonored on presentment.

This precise point, though not decided in this State, has been so decided in other States, by very respectable courts, and upon satisfactory reasons, from analogous cases. *Course v. Shackelford*, 2 Nott & M'Cord, 283; *Poole v. Tolleson*, 1 M'Cord, 199; *Berry v. Robinson*, 9 Johns. R. 121; *M'Kinney v. Crawford*, 8 Serg. & R. 358; *Bishop v. Dexter*, 2 Connect. R. 419. If it be asked, at what time payment of the note shall be demanded, the day originally named for payment having passed, the answer is obvious. As between maker and promisee, a note is payable on demand, at any time after it becomes due. When it is indorsed after due, it is in legal effect a note on demand, and is to be so understood by the parties, as if written "on demand." In that case, the law is well settled, the demand must be made within reasonable time, and if not paid, immediate notice of non-payment must be given to the indorser. *Field v. Nickerson*, 13 Mass. R. 131.

No notice having been given to the indorser in the present case, although the note was indorsed after it became due, the action cannot be maintained.

HORACE TOWER *versus* MARTIN TOWER *et al.*

Under St. 1812, c. 146, § 2, [Revised Stat. c. 58, § 12,] which authorizes "any person to kill any dog or dogs found and being without a collar," it is lawful to kill a dog if he is out of the inclosure of his owner, without a collar, although he be under the immediate care of the owner, and this be known to the person killing the dog.

TRESPASS for killing the plaintiff's dog. Upon a case stated, in the Court of Common Pleas, it appeared, that the dog, when killed, was without a collar, and was out of the inclosure of the plaintiff, but under his immediate care; and that the defendants knew, that it was the plaintiff's dog. *Cummins J.* ruled, that the action could not be sustained, and that judgment should be rendered for the defendants. To this ruling, the plaintiff excepted.

Robinson and Parish, for the plaintiff.

Briggs, D. N. Dewey and Sayles, for the defendants, cited *St. 1835, c. 148, § 4.*

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SHAW C. J. delivered the opinion of the Court. The single question is, whether it was lawful, under *St. 1812, c. 146, § 2*, to kill the plaintiff's dog. The provision is, that it shall be lawful for any person to kill any dog, found and being without a collar as aforesaid. It is contended, that the word "found" implies, out of the immediate care of the owner, as well as out of his inclosure. Even if this were a fair inference if it stood alone, it is to be considered with reference to the 1st section, which requires the owner to furnish his dog with a collar, to be *constantly* worn, whether under the care of his owner or not. It is in reference to this requisition, that the law renders it lawful to kill a dog, found anywhere, and not for the time being furnished with the protection required by law for his security. The matter seems to have been so understood by the makers of the Revised Statutes, who have dropped the word "found," and used the words only "being without a collar as aforesaid." This seems to have been done, not as introducing any new provision, for they give no notice to that effect in their report, but in pursuance of their general plan of omitting superfluous words. Revised Stat. c. 58, § 12. We think it was the intention of the legislature, not to give to the owner of a dog a right to maintain an action for destroying him, unless he had in fact given that security to the public, which the act required, by causing him at the time to wear a collar, with the name and residence of his owner marked thereon.

Exceptions overruled, and judgment of the Court of Common Pleas affirmed.

The Inhabitants of GREAT BARRINGTON *versus* The Inhabitants of TYRINGHAM.

Under *St.* 1793, c. 34, [Revised Stat. c. 45, § 1,] where a minor, deriving his settlement from his mother, resided in another State, employed in learning a trade, and the mother acquired a new settlement in this Commonwealth by a second marriage, before he came of age, it was *held*, that his settlement followed that of his mother.

It seems, that the circumstance, that the minor was not bound as an apprentice by indenture, is not material in such case.

THIS was an action to recover expenses incurred in the support of certain paupers.

By an agreed statement of facts, it appeared, that the paupers were the wife and children of Archibald Gilmore, whose mother acquired a settlement in Tyringham by her marriage with Eliphalet Jewell, on February 25th, 1810; that Archibald was, at that time, a minor living in Connecticut, where he was employed in learning the trade of a shoemaker, by the direction of his mother, (who also lived in that State when he went to learn such trade,) but was not indented as an apprentice; and that he did not reside in this Commonwealth during his minority.

The only question was, whether Archibald followed or took the settlement of his mother, he having no settlement in this Commonwealth, unless derived from his mother.

Sept. 23d. Jones and Sumner, for the plaintiffs, cited to the point, that Archibald Gilmore acquired a settlement in Tyringham by the marriage of his mother, *Plymouth v. Freetown*, 1 Pick. 197; *Parsonsfeld v. Kennebunkport*, 4 Greenl. 47; that he was not emancipated or quasi emancipated, *Pittston v. Wiscasset*, 4 Greenl. 293; *Sumner v. Sebec*, 3 Greenl. 223; *Salisbury v. Orange*, 5 New Hamp. R. 348.

Bishop, for the defendants, to the point, that Archibald did not acquire a settlement in Tyringham, inasmuch as his mother was absolved from all obligation to support him, at the time of her marriage with Jewell, cited *Springfield v. Wilbraham*, 4 Mass. R. 493.

Sept. 24th. SHAW C. J. delivered the opinion of the Court. This case is governed by that of *Plymouth v. Freetown*, 1 Pick 197, in which it was decided, that where a mother acquires

new settlement by marriage, her minor children by a former marriage follow and have such new settlement, by force of the St. 1793, c. 34. The mother acquired a settlement in Tyningham, and her minor legitimate son gained a settlement in that town.

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The only ground of distinction, which could raise a doubt, arises from the fact, that at the time of the mother's marriage, the son was residing in another State, as an apprentice, but not under indenture. This is contended to be *quasi* an emancipation, preventing the operation of the statute. In *Springfield v. Wilbraham*, 4 Mass. R. 493, it was held, that the statute could not be construed literally, that it must be taken with this qualification, that when a person having a derivative settlement from a father or mother, has arrived at full age, is emancipated and acting *suo jure*, the settlement of such person will not change with the subsequent change of the settlement of the father or mother. This seems to be a just limitation of the generality of the words of the statute. In that case, the Court intimated, that possibly there might be other exceptions, putting some instances, but they are careful to give no opinion on them, as they did not arise in that case. The Court are of opinion, that the circumstances found in the present case do not constitute an emancipation, nor bring the case within the principle of *Springfield v. Wilbraham*. In the first place, it is very clear, that the place of residence, within or without the Commonwealth, either of the mother or son, does not affect the question. The privilege or qualification of having a settlement is personal, and attends and attaches to the person. Then it is the common case of a minor, not actually residing with the parent, but residing with another as an apprentice. Such a person is within the express provision of the statute. We think he is not within any implied exception, and therefore his settlement changes with that of the parent from whom it was derived. In this case, it is stated, that the apprentice was not bound by an indenture; probably this circumstance would make no difference; it is not relied on as of any importance in deciding the present case in favor of the plaintiffs.

Defendants defaulted.

THOMAS MINOR Junior *versus* JOEL DELAND.

The St. 1834, c. 184, § 5, provides, "that any person who shall suffer an injury to his land by" cattle, &c. "belonging to another, unless the owner thereof shall be in possession of contiguous land from which such animals shall have escaped through the neglect of the person injured to maintain his part of the division fence," may impound, &c. The owner of a tract of land conveyed a portion of it to the town in which it lay, by a deed containing this clause:—"and it is for the use of a burying-place; if the above described land shall be inclosed with a fence, the same is to be done by the inhabitants aforesaid;" and the town accepted the deed and built a division fence, but did not keep it in repair, and in consequence of this neglect the cattle of the person in the possession of the contiguous land escaped therefrom into the burying-place, and thereupon the town impounded them. It was held, that the town was bound to maintain the fence and that the impounding was, therefore, unlawful.

TRESPASS for taking and impounding the plaintiff's cattle.

At the trial in the Court of Common Pleas, before *Williams* J., it appeared, that the defendant had been chosen agent, by the town of Tyringham, for the purpose of taking care of the burying-ground in that town and defending it from trespassers; that the cattle in question were taken by the defendant damage-feasant, in the burying-ground, on the 10th of August, 1835, and impounded, the defendant being pound-keeper; and that they were subsequently returned to the plaintiff and accepted by him.

It further appeared, that the land for the burying-ground was conveyed to the town by Eben Chadwick, the former owner of the adjoining land occupied by the plaintiff, by a deed containing the following clause:—"and it is for the use of a burying-place; if the above described land or any part of it, shall be enclosed with a fence, the same is to be done by the inhabitants aforesaid;" that the town erected a stone wall between such burying-ground and the plaintiff's adjoining land; and that this wall had fallen down, and at the time of the impounding, was not a legal and sufficient fence within the provisions of the statute on this subject.

By St. 1834, c. 184, § 5, a "*person*, who shall suffer an injury in his land by" cattle, &c. "belonging to another, unless the owner thereof shall be in possession of contiguous land, from which such animals shall have escaped through the neglect of

the person injured to maintain his part of the division fence, may have and maintain an action of trespass *quare clausum fregit* against the owner of the same for his damages ; or he may impound and restrain the creatures doing the damage, or some of them, at his election," &c.

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The jury were instructed, that the defendant was entitled to a verdict ; and they returned a verdict accordingly.

The plaintiff excepted.

Porter, for the plaintiff.

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Bishop, for the defendant, cited *Rust v Low*, 6 Mass. R. 90.

WILDE J. delivered the opinion of the Court.

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At the trial of this cause in the Court of Common Pleas, the jury were instructed upon the facts reported, that the defendant was entitled to a verdict, which was returned accordingly. The question now is, whether this instruction was correct.

At common law, the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription or agreement ; and it is said in the latter case, where the tenant had agreed to fence, yet he could not be compelled to fence ; and the party injured had no remedy, but by an action on the agreement. *Rust v. Low*, 6 Mass. R. 90.

But these principles of the common law have been modified by the St. 1834, c. 184 ; and this case depends on the construction to be given to that statute. By the 5th section, it is provided, that any person who shall suffer an injury in his land by cattle, &c. "belonging to another, unless the owner thereof shall be in possession of contiguous land, from which such animals shall have escaped through the neglect of the person injured to maintain his part of the division fence, may have and maintain an action of trespass *quare clausum fregit* against the owner of the same for his damages ; or he may impound and restrain the creatures doing the damage, or some of them, at his election."

By the obvious construction of this provision of the statute, the defendant, as the agent of the town of Tyringham, had no right to impound the plaintiff's cattle, if they escaped from his field, which was contiguous to that of the town, through their neglect to maintain the division fence, which they were bound

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to maintain. The *locus in quo* was purchased by the town for the burying-ground from one Eben Chadwick, the former owner of the land occupied by the tenant; and in the deed to the town there is the following clause, viz. "and it is for the use of a burying place; if the above described land, or any part of it, shall be enclosed with a fence, the same is to be done by the inhabitants aforesaid."

Now, although there is no express agreement of the town to fence, yet we think, that by accepting the deed, the town were bound to maintain a fence, if it should be necessary to prevent the plaintiff's clattle from escaping from his field into the burying-ground. And it clearly was necessary; for the plaintiff had a right to occupy and depasture his own field; and the escape was through the neglect of the town, within the true meaning of the statute.

New trial granted.

WILLIAM ASHLEY *versus* HARLOW PEASE.

Where a grant is made of a water power, in terms, and the privilege itself is the principal subject, if it is left in doubt, whether it is a grant of a sufficient quantity of water to carry a particular kind of mill, making reference to such mill to indicate and measure the quantity of water power intended to be conveyed, or whether it is a grant of the use of the water to carry such particular kind of mill only, the former construction is to be more favored, because, in general, it is most beneficial to the grantee without being more onerous to the grantor, and because such construction is most favorable to the general interests of the community.

The plaintiff, being the owner of land on a stream of water, and of a water privilege, granted by indenture a parcel of the land, with all the buildings thereon occupied by the grantee for a fulling mill and dyeing house, and the appurtenances and privileges thereunto belonging, and covenanted, that whenever there should be a sufficiency of water to supply the mills standing on the dam, he would permit the grantee to draw from the flood "so much water as may be necessary to carry and supply the fulling mill of the grantee, which now stands or which may hereafter stand on the same spot," but that "when there is not a sufficiency of water for the purposes and uses aforesaid, then the grantee, his heirs and assigns, are to draw water from the said flood for the use of the said fulling mill or mills, twelve hours successively in the twenty-four," [or as it was expressed in the other part of the indenture, "for the uses of his or their fulling mill, as aforesaid twelve hours," &c.,] and that he would maintain fifteen sixteenth parts of the dam; and the grantee covenanted, that he would maintain the other sixteenth part of the dam, and that he would never use his fulling mill or "any other mill standing in the same place, so as in any manner or way to interfere with or obstruct the going of said saw mill of the plaintiff or any mill which may hereafter stand in the same place,

except by drawing water from said floom, as aforesaid." At the time of the execution of the indentures, the business of fulling cloth at such fulling mill had never required the use of the water for more than twenty weeks yearly. It was *held*, that this was not a grant of a water power to carry a fulling mill, to be applied by the grantee, at his pleasure, to any works requiring an equal amount of power, but that the use of such water power was restricted thereby to the purpose of working a fulling mill only.

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THIS was an action on the case for diverting water from the plaintiff's mills.

By an agreed statement of facts it appeared, that on January 30, 1809, the plaintiff being the exclusive owner of the land on both sides of a stream of water in Sheffield, together with the whole of a water privilege thereon, entered into a contract with Allen Pease, the father of the defendant, in pursuance of which an indenture of that date, of two parts, differing a little in their terms, was executed by those parties.

By one of these instruments, the plaintiff, in consideration of the covenants therein contained on the part of Allen to be performed, and in consideration also of \$400 paid by him to the plaintiff, granted and conveyed to Allen a certain parcel of such land, together with all the buildings thereon standing occupied by Allen for a fulling mill and dyeing house, to have and hold with the appurtenances and privileges thereunto belonging, to Allen, his heirs and assigns, and covenanted with Allen, his heirs and assigns, that he, his heirs, executors and administrators, will, at all times, when there is a sufficiency of water in the pond occasioned by the aforesaid dam to carry and supply the uses of all the mills which now are standing, or hereafter may in their places be standing, on said dam, suffer and permit the said Allen, his heirs and assigns, to draw from the aforesaid floom so much water as may be necessary to carry and supply the fulling mill of the said Allen, which now stands or which may hereafter stand on the same spot, on the tract of land above described and granted; but when there is not a sufficiency of water for the purposes and uses aforesaid, then the said Allen, his heirs and assigns, are to draw water from the said floom for the use of the said fulling mill, *or mills*, twelve hours successively in the twenty-four, and no more." In the same instrument, Allen covenants, that neither he, nor his heirs and assigns, shall "ever use or occupy the fulling mill of the said

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Allen, which now stands on the before granted and described tract of land, nor any other mill or buildings which may hereafter stand in the same place, so as in any manner or way to interfere with or obstruct the going or working the said saw mill of the said William, or any other saw mill or other building, which the said William, his heirs or assigns, may hereafter build in the same place, or in any manner so as to injure said saw mill or other building." The parties further mutually covenanted with each other, that they would always maintain and keep in repair such dam and floom, or others in their places, "in the manner and proportion following, viz. the said William is to maintain and keep in repair fifteen sixteenth parts of said dam and the whole of said floom which does not stand against the said fulling mill of the said Allen, and the said Allen is to maintain and keep in repair the other one sixteenth part of said dam and the whole of said floom which stands against his said fulling mill at his own expense."

In the other part of the indenture, the sum of \$ 200 is alleged to have been paid by Allen to the plaintiff as a part of the consideration of the grant ; and the provision in regard to the use of the water by the grantee is in the following terms : " And furthermore the said William, for and in consideration above mentioned, doth hereby, for himself, his heirs," &c. "covenant and agree to and with the said Allen, his heirs," &c. "that he, the said William, his heirs," &c. "will and shall at all times, when there is a sufficiency of water in the pond caused by said dam to carry and supply the uses of all the mills (said fulling mill included) on said dam, or which may hereafter stand in their places, suffer and permit the said Allen, his heirs and assigns forever, to draw from the aforesaid floom in the said dam, so much water as shall be necessary to carry the fulling mill aforesaid of the said Allen, and any fulling mill, which may hereafter stand in the same place. But when there is not a sufficiency of water for the purposes and uses aforesaid, then the said Allen, his heirs and assigns, are to draw water from said floom for the uses of *his or their fulling mill, as aforesaid*, twelve hours successively in the twenty four, and no more." In this instrument, Allen covenants, that he and his heirs, &c. will never "use or work the said fulling mill, nor

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any other mill standing in the same place, so as in any manner or way to interfere with or obstruct the going of said saw mill of the said William, or any mill which may hereafter stand in the same place, except by drawing water from said floom, as aforesaid." There was a mutual covenant to keep the dam and floom in repair, or others in their places, in the manner and proportion above mentioned. At the end of the instrument was a *nota bene* setting forth, that "the word, *fulling*, in particular, and several other words, were interlined before the execution hereof."

It was admitted, that the defendant, who was the grantee of his father, Allen, had no other right of taking the water than such as was granted to Allen by this indenture, and that the plaintiff had all the rights which he had in 1809, except such as were then conveyed to Allen; that the defendant erected a carding machine in the building occupied by him on the land so granted to him, and had used the water of the stream for the purpose of working such carding machine as well as the fulling mill, but not at one and the same time; that the plaintiff was the owner of several mills and machines, as stated in the declaration, and that his ground is favorably situated for the erection of several manufacturing establishments; that previously to the erection of the defendant's carding machine the plaintiff had one, the net income of which was worth \$75 a year, and that since the erection of the defendant's machine the plaintiff's had not been used; that the defendant, since the erection of his carding machine, had been accustomed to use a greater quantity of water by the year, than had ever been used for the purposes of the fulling mill; that the business of fulling cloth at the fulling mill had never required the use of the water for a greater period than twenty weeks yearly, but that the defendant had used the water for the carding machine during nearly the whole of the year; that the carding machine had, at all times, been propelled by the fulling mill wheel, and required no greater quantity of water than would have been required for the fulling mill; that at the time of the execution of the indenture a fulling mill building was standing on the land conveyed, which had never been used more than twenty weeks in the year, nor for any other purpose than for a fulling mill; that previously

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to the commencement of this action the defendant had pulled the same down, and erected another on the same site ; and that the plaintiff's interest in the land and privilege, at the time of the execution of the indenture, was of the value of \$ 4,500.

It was further agreed, that such part of the above statement of facts as would have been inadmissible in evidence on a trial of this case by a jury, should be disregarded by the Court.

Sept 20th.

C. A. Dewey, Barnard and W. G. Bates, for the plaintiff
Two questions arise upon the construction of this indenture ; 1. Whether Allen, the grantee, was limited in the use of the water to a fulling mill, or could apply the same quantity of water to other purposes ; and 2. If he could use the water for other purposes, whether he could take more water *by the year*, than would carry a fulling mill twenty weeks, or so long as would be required by a fulling mill. There is a distinction between deeds poll and indentures, in regard to the rules by which they are to be construed. In a deed poll an ambiguity is to be construed against the grantor ; but not so, in an indenture, because both parties have given their consent to the words.

The defendant is limited, in the use of the water, to a fulling mill only. The words of the indenture, the situation of the parties, the uncertainty as to the quantity of water granted, and the usage by the grantee, show that it was intended to limit the quantity by the use to which it was to be applied. *Strong v. Benedict*, 5 Connect. R. 221 ; *Livingston v. Ten Broeck*, 16 Johns. R. 14 ; *Biglow v. Battle*, 15 Mass. R. 313 ; *Luttrell's case*, 4 Coke, 86 ; *Robert Mary's case*, 9 Coke, 113 ; Jac. Law Dict. *Common of Estovers* ; Cruise's Dig. tit. 24, *Way*, §§ 15, 16 ; *Howell v. King*, 1 Mod. 190 ; *Lawton v. Ward*, 1 Ld. Raym. 75 ; *Bullen v. Runnels*, 2 New Hamp. R. 255 ; *Johnson v. Rand*, 6 New Hamp. R. 22 ; *Dygert v. Matthews*, 11 Wendell, 35 ; *Sprague v. Snow*, 4 Pick. 54 ; *Hatch v. Dwight*, 17 Mass. R. 289 ; *Sumner v. Williams*, 8 Mass. R. 214.

Such being the intention of the parties, there is nothing in the general grant, of the privileges and appurtenances, to counteract the effect. *Tyler v. Hammond*, 11 Pick. 193 ; *Dunlap v. Stetson*, 4 Mason 366 ; *Provost v. Calder*, 2 Wendell, 517 ; *Sprague v. Snow*, 4 Pick. 54 ; Back. Abr. *Grant*, 1, 2

In Maine and Massachusetts, grants and devises of lands "for the use of schools," or "for the use of the ministry," have been held to create conditional estates. *Porter v. Griswold*, 6 Greenleaf, 430. If in such cases, those words have been held to limit an estate to a particular purpose, the same words should have a corresponding effect in relation to the incidents of real estate. *Co. Lit.* 204 *a* ; *Portington's case*, 10 Coke, 42 ; *Browning v. Beston*, 1 Plowd. 131.

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Bishop and Hall, for the defendant, cited *Cutler v. Tufts*, 3 Pick. 272 ; *Cooper v. Smith*, 9 Serg. & R. 26 ; *Strickler v. Todd*, 10 Serg. & R. 63 ; 3 Kent's Comm. 356 ; *Biglow v. Battle*, 15 Mass. R. 313 ; *Saunders v. Newman*, 1 Barn. & Ald. 258 ; *Stiles v. Hooker*, 7 Cowen, 263 ; *Ingraham v. Hutchinson*, 2 Connect. R. 584 ; *Com. Dig. Grant*, E 9 ; *Co. Litt.* 121 *b*, 122 *b* ; *Doane v. Broad Street Association*, 6 Mass. R. 332 ; *Story v. Odin*, 12 Mass. R. 157.

SHAW C. J. delivered the opinion of the Court. The decision of the present case must depend exclusively upon the construction of the contract entered into by the plaintiff, with Allen Pease, the defendant's father and grantor, on the 30th of January, 1809. It is conceded, that up to that time, Ashley, the plaintiff, was the exclusive owner of the land on both sides of the stream, together with the whole of the water privilege, that he retains all the rights incident to such ownership to the present time, except such as he parted with by this contract, and that Harlow Pease, the defendant, has now all the rights which were conveyed to his father by that contract. Nor will the doctrine relative to the legal rights of riparian proprietors, go far to aid the construction of the contract, because admitting, that by the terms of the grant of land, the grantee became such a proprietor, that is, an owner of land bounding on the stream, (which is denied,) such general right is limited, restrained, and regulated by the terms of the contract. Presumptions are resorted to, as a means of ascertaining the intentions of parties, whenever they have not expressed them with sufficient clearness. But *conventio legem vincit*. General ownership embraces the right to use the whole of the water power, to every extent and for every purpose to which it can be legally used. If having thus the unlimited *jus disponendi*,

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the owner chooses to grant, and the grantee chooses to accept a grant, either of the land without the water privilege, or this without the land, or a qualified and limited right to the water power, there is no legal impediment to such a grant, nor will it be controlled by the general presumption in relation to the rights of riparian proprietors. That the right intended by the parties to be so granted and accepted, *was* limited and qualified, we think is manifest from the general tenor of the contract, and is especially confirmed by one of the covenants, in which the grantee stipulated, that neither "he, the said Allen, nor his successors or assigns, shall or will ever use, occupy, or work the said fulling mill, nor any other mill standing in the same place, so as in any manner to interfere with or obstruct the going of said saw mill of said William, or any mill which may hereafter stand in the same place, except by drawing water from said floom as aforesaid." The words "obstruct" and "interfere with," if they stood alone, might be understood to mean the interposition of some direct impediment. But the exception explains them, and shows what was intended. How would drawing water from the floom obstruct or interfere with the going of the plaintiff's mill? Surely in no other way, than by diminishing the water power intended to carry it. Thus explained, the stipulation is, that the grantee will not obstruct the plaintiff's mills, by using and diminishing the water power, except by drawing water from the floom, as aforesaid, that is, as far as the right is granted by the foregoing contract. The effect is, to limit the right of using the water to that granted; and then the question recurs, what is the nature and extent of the right thus conferred.

One other observation it may be proper to make, before proceeding to the direct question, on the construction of the contract. Here two instruments of the same date were executed by the parties, differing a little in their terms. These were manifestly executed at one and the same time, and relate to the same subject matter, and they must therefore be taken and construed together; every stipulation, covenant, and clause contained in either may be resorted to, to ascertain the meaning of the parties. The effect will be, that general words in one, will be limited and qualified by more special stipulations in the

other. If a general right is granted in one, and this is restrained by the provisions in the other, the qualified right only will be conferred. When the provisions are different but not repugnant, according to the general rule, the words of grant, covenant, or acknowledgment, would be taken most strongly against the party using them, and the largest right, which the construction of either instrument would admit, would be taken to be conferred on the grantee, covenantee, or party benefited. To illustrate this by an instance in these two instruments. One states the consideration to be \$400, the other \$200. These, though various, are not repugnant. Supposing the question were upon the actual consideration paid, and to be proved by these deeds, it would be taken most strongly against the party acknowledging the receipt of the money, and prove that the larger sum, \$400, was paid.

It may be proper to advert to some rules of construction, applicable to the grants of water powers. In general, where a mill-seat is granted, that is, land on a stream on which mills are actually situated, or where it appears by the grant, that the object is to erect mills thereon, the soil is the principal subject of the grant; the right to use it for any and all mill purposes at the pleasure of the owner, and to change those uses at pleasure, follows as incident to the ownership; and words of description of the water power, such as the right to use the stream, for the saw-mills and grist mills, &c., situated, &c., are not to be considered as restrictive of the more general right, incident to the ownership.

Again, where the grant is of a water power, in terms, described, and where the privilege itself is the principal subject, if it is left in doubt, whether it is a grant of a sufficient quantity of water to carry a particular kind of mill, making reference to such mill to indicate and measure the quantity of water power intended to be conveyed, or whether it is a grant of the use of the water to carry such particular kind of mill only, the former construction will be more favored, because in general it is most beneficial to the grantee, by allowing a latitude of choice in the use he shall make of it, without being more onerous to the grantor, and therefore most consistent with the general rule applicable to the construction of grants, and because such con-

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struction is most favorable to the general interests of the community, by encouraging enterprise and promoting public improvements. It is better adapted to the growing and changing wants, and the ever varying pursuits of an active community.

Still, for the reasons already given, it is competent for the owner of the whole of a mill privilege to grant a part, and any part which he pleases, and for the grantee to accept such part, and of course it is competent to grant the right to use water for the purpose of carrying a particular species of mill and no other. And the question in this case is, whether it was a grant of water enough to carry a fulling mill, to be applied by the grantee to carry a fulling mill, or an oil-mill, or other works requiring equal power at his pleasure, or whether it was a grant of a right to draw water to carry the fulling mill only, and restricted to that use. The Court are of opinion, that the latter is the true construction of this grant, and that it was intended, not to measure and limit the quantity of water power, but to restrict the use of the water to the actual purpose of carrying a fulling mill, either the one then standing or some other fulling mill to be erected at the same place. This seems to us to be the natural and obvious import of the words of the grant used in the contract, and this construction is confirmed by all the other provisions of the contract and by all the attending circumstances.

Ashley covenants for himself, and his heirs, with Pease, his assigns, &c., that they will, at all times, when there is a sufficiency of water to supply all the mills now standing, or which may be standing in their places, suffer and permit Pease and his assigns to draw so much water as may be necessary to carry and supply the fulling mill of Pease which now stands, or which may hereafter stand on the same spot, but when there is not such sufficiency of water, Pease and his assigns are to draw from the floom, for the use of the fulling mill *or mills*, twelve hours successively in the twenty-four hours and no more. The clause is nearly the same in the other instrument, except that the words "*or mills*" are not inserted, but the language is that Allen and his assigns are to draw water from the floom, for the uses of his or their fulling mill as aforesaid, twelve hours, &c. This was a perpetual grant, not therefore limited to the identical mill then standing, which must decay, but any and all

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mills subsequently to be erected for the same purpose, on the same spot. Hence the use of the plural, "*mills*." Again, from the proportions, in which the parties were to contribute to the maintenance of the dam, it is obvious, that the amount of water power granted to Pease, compared to that of the whole, was small, viz., as one to fifteen. But the right, when the water was insufficient to draw for twelve hours in twenty-four, which might be the twelve working hours, a sufficient quantity of water to carry any fulling mill of any size, and that quantity adapted and applied to other uses, as to a manufactory, would seem to constitute a much larger quantity of the power than was contemplated. At the time that grant was made, it may have been contemplated, that a fulling mill would probably be employed only to full the home-manufactured cloth for customers in the vicinity, and would, therefore, be carried on upon a small scale, for a part of the year only, and that part when there was a superabundant supply of water. Still if the grantee chose, using it only as a fulling mill, to extend his work, and to run it the whole year, he had a right so to do. There was no restriction of that use. Of this the grantor took his chance, which he might consider that he run no great risk in doing, if confined to that use. This leads to another remark, which is, that it could hardly be intended to measure the quantity of water power granted, because it was, of itself, so uncertain a one. The use would be governed by the amount of custom, the number of weeks that such custom would require the use of the mill in each year, and the season of the year. If it had been intended to operate as a grant of water power sufficient to carry a fulling mill of any size and of any number of fulling stocks, for twelve hours of the day through the year, it would probably have been expressed in somewhat different terms. And yet it seems difficult to limit it to any amount short of this, consistently with the claims of the defendant.

On the best consideration we have been able to give to this grant, the Court are of opinion, that it was the grant of a right to use the water for driving the fulling mill, and for no other purpose, and that the use of it to carry a carding machine, was unauthorized, and has subjected the defendant to an action.

JOHN CHAMBERLIN *versus* CUSHING SHAW *et al.*

A farm and a certain number of sheep were leased, "to hold one year from the 1st of April, 1833, reserving 550 lbs. of wool of a quality of an average with the flock;" and it was further stipulated in the lease, that the sheep should not be counted to the lessee till after shearing in June 1833, and that they should be counted back to the lessor after shearing in June 1834. The lessee sheared the sheep in June 1834, and sold the wool. In trover by the lessor against the lessee and his vendee, it was *held*, that from April to June, 1834, the lessee had neither the general nor special property in the sheep, nor the legal custody or possession, but that he had a right by implication to enter on the farm at a suitable time to shear them and count them out to the lessor; that the general property in the sheep, and consequently in their wool, was in the lessor, and the implied stipulation, that the lessee should have all the wool over 550 lbs., was an executory contract, which vested no property in the lessee in any part of the wool before a separation of the 550 lbs. from the remainder, and as no separation had taken place at the time of the sale and of the lessor's demand of the wool, the property continued in the lessor; that the measure of the plaintiff's damages was the value of the 550 lbs. at the time of the conversion; that as the two defendants were together, and both in possession of the wool, and both refused to deliver it up on demand, there was a joint conversion which would sustain an action against them jointly; and that it was not necessary for the plaintiff to prove that the vendee had notice of the invalidity of the lessee's title.

TROVER for 1000 lbs. of wool. Ebenezer T. Shaw, one of the defendants, was defaulted; and the other, Cushing Shaw, pleaded the general issue, which was joined.

At the trial, before *Wilde J.*, the plaintiff produced a lease, not under seal, by which he leased to Ebenezer T. Shaw, a farm in Windsor and 300 sheep, "to hold one year from the 1st of April, 1833, reserving 550 lbs. of wool of a quality of an average with the flock;" and by the subsequent terms of the lease, it was agreed, that the sheep should not be counted to the lessee till after shearing in June 1833, and that they should be counted back to the plaintiff after shearing in June 1834, the lessee to make good any deficiency, and to take the risk of the sheep till they were so counted back. There was no provision made for rent other than is above set forth.

It appeared, that the farm was, until April 1833, in the tenancy of one Painter, who, by the terms of his lease, was to have one half of the wool of the sheep from the shearing of the summer of 1833; that the plaintiff and Painter had the wool of that shearing accordingly; that the farm was leased to

one through, from April 1, 1834, but that he was not to have the wool of the sheep till the shearing of 1835, the plaintiff and Ebenezer T. Shaw both saying to him, at the time of the letting, that Ebenezer was to have the wool of the shearing of 1834, excepting 550 lbs. thereof, which he was to render to the plaintiff for the rent of the previous year.

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Ebenezer T. Shaw sheared the sheep in June 1834 ; and there was evidence tending to show a sale of the wool by him to Cushing Shaw. While Cushing had the wool in his possession, and was on the way with it, in company with Ebenezer, to his own residence, the agent of the plaintiff demanded of them 550 lbs. of the wool, claiming it by virtue of the lease from the plaintiff to Ebenezer ; but Cushing refused to give up the wool.

The defendants contended, that, upon these facts, the plaintiff either had no property in the wool, or was a tenant in common with Ebenezer, and that in either case he could not prevail in this suit ; but the judge, for the purposes of the trial, ruled that the plaintiff could maintain the action for 550 lbs. of the wool.

It appearing, that there was more than 550 lbs. of the wool in the possession of Cushing, the plaintiff insisted, that he had such a property in, or lien upon, the wool, that damages should be assessed in his favor for the whole amount of the wool, including the excess over 550 lbs. ; but the judge ruled otherwise.

The jury assessed damages for the plaintiff at the sum of \$ 304.39.

The Court were to render judgment on the verdict, or grant a new trial, or direct a nonsuit, according to the law.

Marsh, for the plaintiff, to the point, that if one tenant in common of a chattel sell it, an action of trover will lie against him by his co-tenant, cited 3 Stark. on Evid. 1496, note ; *Wilson v. Reed*, 3 Johns. R. 175 ; 2 Esp. Dig. 587.

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Alvord, for the defendants. The question is, whether, under the lease, Ebenezer T. Shaw was entitled to the wool sheared in 1833, or that sheared in 1834. The lease is ambiguous as to the year ; but as the sheep were not to be counted to the lessee till after the shearing in 1833, and as the lessee was to have the custody of the sheep, and *they were to be*

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at his risk, till after the shearing in 1834, it follows, that he was to have the wool sheared in 1834. *McDonald v. Hewett*, 15 Johns. R. 349. Although this was in terms a lease of both the farm and the sheep, commencing and ending on the 1st of April, still, taking into consideration all the terms of the lease, and also the circumstance, that a crop of wool, the growth of the preceding year, cannot be sheared till June, it may be sustained as a lease of the farm for a year commencing on the 1st of April, and as a lease of the sheep for a year commencing at the shearing in June.

We contend, that on the face of the lease, the wool sheared in 1834 was to go to the lessee; but if this does not appear on the face of the instrument, it is proved by the parol evidence, the lease itself not being conclusive as to strangers. 3 Stark. on Evid. 1051; *Overseers of New Berlin v. Overseers of Norwich*, 10 Johns. R. 229.

The plaintiff had no property in the 550 lbs. of wool, until it should be separated from the residue and delivered to him; and as no such separation was ever made, his right of property did not accrue. The defendant, by virtue of the lease, became owner of the sheep, with a special property, for the time being, and therefore he was the owner of the wool as the product thereof. The rent was not necessarily to be paid in the wool which should be taken from these sheep. *Newcomb v. Ramer*, 2 Johns. R. 421, note; *Stewart v. Doughty*, 9 Johns. R. 108; *Brainard v. Burton*, 5 Vermont R. 97; Bull. N. P. 85; *Butterfield v. Baker*, 5 Pick. 522; *Wait, Appellant*, 7 Pick. 100; *Young v. Austin*, 6 Pick. 280; *Merrill v. Hunnewell*, 13 Pick. 213; *Austin v. Craven*, 4 Taunt. 644; *White v. Wilks*, 5 Taunt. 176.

But if the plaintiff and the lessee were tenants in common, judgment must nevertheless be for the defendant, Cushing Shaw. Upon the question, whether the sale of a chattel held in common, by one of the tenants, is a conversion, the decisions are contradictory. *Heath v. Hubbard*, 4 East, 128; *Oviatt v. Sage*, 7 Connect. R. 95; *Wilson v. Reed*, 3 Johns. R. 175; *Farr v. Smith*, 9 Wendell, 338; *Barton v. Williams*, 5 Barn. & Ald. 395. But it is agreed in all, that the purchaser is not guilty of conversion, and liable in trover to

the co-tenant, until he denies the right of the co-tenant. *Mer- Chamberlin*
sereau v. Norton, 15 Johns. R. 179 ; *Pettingill v. Bartlett*,
 1 New Hamp. R. 87. There was then no conversion by
 Cushing Shaw till he refused to give up the wool ; and if he
 succeeded to the rights of Ebenezer, there could have been
 no conversion by him, unless by a sale. *v. Shaw.*

But suppose that there was a conversion by Cushing, it was not a *joint* conversion. The demand and refusal are only *evidence* of a conversion.

SHAW C. J. afterwards drew up the opinion of the Court. [After stating the facts.] It is to be regretted, that, in a case where the rights of the parties, in point of law, must depend upon the construction of the instrument of lease, where every clause and stipulation is important to determine the exact meaning of the parties, the instrument itself cannot be produced. But it unfortunately happens, without the fault of anybody, as far as appears, that neither of the two parts of the instrument can be found, and that we are obliged to decide upon such imperfect statement of the instrument, as the recollections of counsel can supply.

In the first place, it was contended, on the part of the defendant, that the plaintiff had no property in the wool, until the separation of the 550 lbs., and as no such separation was ever made, his right of property did not accrue. This leads us to the question, who was the general owner of the wool before separation. The general rule is not contested, that the owner of cattle or stock is, *prima facie*, the owner of all the proceeds and profits and products thereof. But it was contended, that the defendant, by virtue of the lease, became owner, with a special property for the time being, and therefore he was the owner of the wool as its product. The first result of this argument would be, a claim to the wool, the product of the shearing of June 1833, because at that time he was lessee of the sheep. But it would be absurd to contend, that under a lease for one year he could claim two annual crops. But then it is contended, and this is the strongest view of the case for the defendant, that although this was in terms a lease of both the farm and sheep, commencing and ending with the 1st of April, yet taking the whole instrument together, and

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taking also the well known physical fact, that a crop of wool, the growth of the preceding year, cannot, in our climate, be taken on the 1st of April, but must be postponed to June, it may be sustained as a lease of both for a year; that of the farm to commence on the 1st of April, that of the sheep at the shearing in June. But on consideration, this view seems not admissible; the farm and the sheep are included in the same sentence, followed by the words "to hold for the term of one year." Further, the lessee was to take charge and possession of the sheep, find and keep them from the 1st of April, and the owner and landlord was to resume the possession at the same period, the ensuing year. The instrument is brief and does not go into details. It would seem to be a very forced construction of it, to suppose that the sheep were to be kept anywhere else than on the farm thus let. Then, if the farm was to be relinquished on the 1st of April, it follows inevitably, that the possession of the sheep was to be given up at the same time. The provision, that the sheep were to be counted out to Shaw, after shearing in June, and by him back to the landlord, after shearing the following June, if it stood alone, might countenance the construction contended for; but controlled as it is, by other stipulations, and by the very explicit terms of the leasing clause, it may well enough be accounted for, on the supposition, that this was to fix the time at which the lessee's undertaking to bear the risk of the sheep was to commence and terminate. We think then, that the relation in which Shaw stood to the sheep, from April to June, 1834, was this; he had neither the general nor special property in them, nor the legal custody or possession, but he had a right by implication, to enter at a suitable time to shear them, and count them out to the owner, in discharge of his undertaking to be responsible for their number. But having neither general nor special property, his entering under a right in nature of a license and shearing the sheep, would not make the wool his property; that would follow the ownership in the sheep which produced it.

It may be asked, how Shaw was to hold any property in the wool. Amongst the express terms of the instrument, there is no provision that he shall have any of the wool; but there is

such a right by necessary implication. The stipulation, that the landlord is to have 550 lbs. of the wool, and, as we think, of the wool of that flock, carries a strong implication, that the lessee, who had kept the sheep through the greater part of the year, within which the wool was growing, should have the remainder ; and as a necessary incident, that he should have a right to enter and shear the sheep. The implied stipulation on the part of the landlord, that the lessee should have all the wool over 550 lbs., was an executory contract, that would vest no property in the lessee, in any part of the wool, until some further act to be done, and that act in the present case was the separation of the 550 lbs. from the remainder.

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The Court are, therefore, of opinion, that at the time of the shearing the general property in the whole of the wool was in the plaintiff, and as no separation had taken place, it remained in him at the time of the conversion.

It is then asked, if the plaintiff was the owner of the whole at the time of the conversion, why the damages should not have been assessed for the whole amount.

In an action of trover, though the plaintiff's possession of the property has been violated, he waives all claim to damages on account of that violation, and seeks an indemnity only for the loss of his property. Hence it is, that the value of the property at the time of the conversion is *prima facie* the measure of damages. Now if the case is so situated, that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject of course to all legal liens. The assignees denying and intending to contest the factor's lien, get possession of the goods and convert them. The factor brings trover, establishes his lien and recovers. How shall damages be assessed ? If he recover the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid circuity of action, why should not damages be assessed to the amount of his lien ? He is fully indemnified,

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the balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if for any cause, the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff. *Green v. Farmer*, 4 Burr. 2214. This is such a case; on a severance, the defendant, Ebenezer T. Shaw, would have been entitled to all over 550 lbs., and he transferred his right and interest to the other defendant. The plaintiff is indemnified by a recovery to the value of his 550 lbs., and he will be responsible over to no other person. We think, therefore, there is no reason to disturb the assessment of damages.

It was, however, contended, that the plaintiff could not recover in this joint action, because there was no joint conversion; but the evidence shows a sufficient joint conversion. The defendants were both together, and both in possession of the wool, and both refused to deliver the wool on demand. It is admitted by one by his default, and it is proved against the other by the evidence. Nor was it necessary to show that the defendant, Cushing Shaw, had any notice of the invalidity of the title of the other defendant. The plaintiff having proved his property, and shown a demand and refusal, which is evidence of conversion, has established his case. The defendant, Ebenezer T. Shaw, had no property in himself, and so far from having any power or authority from the plaintiff, the evidence strongly tends to show, that his attempt to sell the whole was a manifest fraud on the plaintiff. Having neither title in him, nor power from the owner, his contract of sale could confer no title on the vendee.

ELIZABETH LEE, Appellant, &c.

A testator, without children, bequeathed his personal property, with certain specific exceptions, to his wife, and then devised a portion of his real estate to his executors in trust to sell the same and pay his debts and certain legacies out of the proceeds. After the execution of the will, the testator sold that portion of his real estate and purchased other real estate. The Probate Court having refused to grant the executors a license to sell the after-acquired real estate of the testator for the payment of his debts, it was *held*, that the wife, who had petitioned that such license might be granted, was entitled to appeal; and that the after-acquired real estate should be first applied to the payment of the debts, it being clearly the intent of the testator, that the personal estate bequeathed to his wife should be exempted from liability for such debts.

THIS was an appeal from a decision of the Probate Court.

On November 27th, 1818, Elisha Lee, of Sheffield, the husband of the appellant, executed his will, which contained the following devise :

“ I will and devise to my beloved wife, Elizabeth Lee, all my personal property, excepting only therefrom my law library, and my other private library, with the exception of forty volumes which she may select therefrom, and also twenty-two shares in the Twelfth Massachusetts Turnpike Corporation, being one half of the shares of which I am the owner therein. I furthermore give and bequeath unto her the use and improvement and profits of all my real estate lying and being in said Sheffield, for and during her natural life.” The will, then, after several devises of real estate, and of the personal estate so excepted, proceeded as follows : “ And it is my will, that the remaining one hundred and seventy acres of land in said Canandaigua,” &c. “ be sold by my executors hereafter mentioned, and the proceeds thereof be applied to the following purposes, viz. three hundred dollars to be given to the Foreign Missionary Society, two hundred dollars to the American Bible Society, and the residue to be applied equally for the benefit and behoof of my said executors, my own debts being first discharged and paid from the same fund; and I hereby give and bequeath the said tract of land last mentioned to my said executors, their heirs and assigns, in trust for the purposes aforesaid. And, furthermore, it is my will, that the remainder of my real estate in Sheffield, after the life estate before devis-

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ed to my beloved wife, shall be divided between Elisha Lee, son of Milo Lee, and Charles Lee, son of Samuel Lee, Esquire." The testator died without children and his estate was to go to collateral heirs.

After the will was executed, the testator sold the lands in Canandaigua. His executors petitioned the Probate Court for a license to sell for the payment of his debts, certain real estate which was purchased by the testator after the execution of the will; and the appellant presented a petition at the same time, and in the same case, that such license might be given; but the Probate Court refused to grant the petition of the executors.

From this decision of the Probate Court, the appellant appealed, and assigned for cause, that the testator bequeathed to her all his personal estate, with certain exceptions, and exempted the same from the payment of his debts.

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C. A. Dewey and Barnard, for the appellant, cited *Booth v. Blundell*, 1 Meriv. 193; *Seaver v. Lewis*, 14 Mass. R. 83; *Hays v. Jackson*, 6 Mass. R. 149; *Thellusson v. Woodford*, 4 Ves. 325.

Porter, contra, in behalf of the heirs at law. The personal estate is the primary and appropriate fund for the payment of the debts, and must be so applied, before resort is had to devised or undeviseed real estate. *Tower v. Lord Rous*, 18 Ves 138. It is not enough, that the real estate is charged with the payment of the debts, but it must appear clearly, that the personal estate is discharged therefrom. *Rogers v. Rogers*, 3 Wendell, 503; *Bootle v. Blundell*, 1 Meriv. 193; *Hancox v. Abbey*, 11 Ves. 186; *Tait v. Lord Northwick*, 4 Ves 816; *Brummel v. Prothero*, 3 Ves. 111; *Manning v. Spooner*, 3 Ves. 114; *Livingston v. Livingston*, 3 Johns. Ch. R. 153; *Livingston v. Newkirk*, 3 Johns. Ch. R. 319. There is a difference between a *specific* and *general* bequest of personal property. In the latter case, the property is liable to the payment of debts, unless there is a plain declaration in the will to the contrary. In the present case, there was no such plain declaration, but simply a general bequest; and the will is to be taken as silent in regard to debts, the land charged with the payment thereof having been sold by the testator. This sale was a revocation of the will *pro tanto*. It annihilated

the fund out of which it was provided that the debts should be paid, and threw the liability for the debts back upon the personal property as the fund first chargeable with their payment.

Walton v. Walton, 7 Johns. Ch. R. 262 ; *Seaver v. Lewis*, 14 Mass. R. 83 ; *Hays v. Jackson*, 6 Mass. R. 149.

Tucker, for devisees.

SHAW C. J. delivered the opinion of the Court. This is an appeal from a decision of the Probate Court, which was taken under these circumstances. The executors of the will of Elisha Lee, late of Sheffield, in this county, petitioned for a license to sell some part of the real estate of the deceased for the payment of his debts, and the widow, the appellant, presented a petition at the same time, and in the same case, praying that such license might be granted. This she claimed a right to do, on the ground, that by the will of her deceased husband, most of his personal property was bequeathed to her, exempt, as she alleged, from the liability for the payment of debts ; that if such license were granted, it would give effect to that exemption in her favor ; if otherwise, by operation of law, the personal property would be taken by the executors and applied to the payment of the debts of the deceased ; so that she had a direct interest in that question.

When this case first came before the Court, some doubt was expressed, whether, as the immediate question is between the executor and the heir, the widow can be considered a party aggrieved, so as to be entitled to an appeal. The interest of the widow is sufficiently manifest and real ; the only question is, if it is sufficiently direct and immediate, to permit the Court to recognize her as a party.

In the case of *Hays v. Jackson*, 6 Mass. R. 149, the leading case on this subject, the parties were the same. A petition for a license was presented by the executors. Mrs. Swan, who claimed certain estate under the will, either joined with them in the petition, or filed a petition in aid of their claim, and this was resisted by the heir at law, claiming after-purchased real estate, by descent. Mrs. Swan, the residuary legatee, claiming under the will, was recognized as a party properly before the Court. The only difference in this respect between that case and the present is, that there, the case came

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up upon an original petition to this Court, and here, by force of a more recent statute, the petition was originally presented to the Probate Court, with a right of the party aggrieved to appeal.

Indeed, the whole question, of substantial interest, is between the legatee and the heir, and the executors are usually mere trustees, bound to administer the estate according to law, but to them it is generally quite immaterial out of what fund the debts are paid.

But in order to consider these questions more distinctly, to ascertain who are proper parties, in a petition for license to sell real estate for the payment of debts, it may be proper to inquire what questions are rightfully presented to the Court for decision upon such proceeding, whose interests are affected by them, and what is the effect and operation of such decision upon those interests.

By the policy of our law, all property, real and personal, upon the decease of the owner, is made liable for the payment of his debts, and no testamentary disposition which he can make, can exempt either species of property from that liability, when the whole is necessary. But when the whole is not necessary, the owner may dispose of the surplus by will; and under this power he may direct what species or portions of his property shall first be applied to the payment of his debts, and what portions or kinds of his property shall be exempted from this liability, and this direction will be so far respected by the law, that the latter shall not be taken until the former has proved insufficient. Thus, though the personal property is the first and natural fund for the payment of debts, yet if the testator expressly exempts some personal property, as by a specific legacy of a coach and horses, or plate and pictures, and directs his debts to be paid out of other funds, or leaves other funds not exempted, such specific legacies shall not be taken for debts, if there are other funds, so first liable.

Again, the executors of a will are not only to administer the property which is given by the will, but by force of the statute, if there be any property not embraced in the will, they are to administer it as intestate, in the same manner as the administrators of estates wholly intestate. As to real estate, such

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intestate property may consist either of real estate, which the testator owned at the time of executing his will, but which was not embraced in any devise, or of estate purchased afterwards, which by law could not pass by a devise,* or be in any respect affected by the will. As to real estate devised, it was competent for the testator, under the general power of ownership, the *jus disponendi*, to authorize and empower his executor to sell it and apply the proceeds to the payment of debts, and then no license for that purpose would be necessary. But although it is in the power of a testator to clothe his executor with such a power to sell, yet if he fails to do it, and it is necessary to make such sale, in order to convert the real estate into money and thus make its assets for the payment of debts, or if the estate was purchased after the making of the will, so that the will, whatever were its terms, would not operate upon it, in either of these cases, it becomes incumbent on the executor to apply to a court, having by statute the jurisdiction in such case, to grant a license accordingly.

This view will enable us to ascertain, to some extent, what questions must arise upon such petition. They will be these, whether there are debts owing and unpaid; whether the personal property has been all applied and exhausted; if not, then whether the property not applied, is by the terms of the will exempted, until certain real has been first applied; if so, of the several portions or parts of the real estate, which shall first be applied, as for instance, lands specifically directed to be sold for the payment of debts, after-purchased lands, lands embraced in a residuary devise, land specifically devised but which is subject to the payment of debts, by the terms of the will, before specific bequests of personal property specifically exempted, until all other sources fail. In fine, the Court are called on, in such case, necessarily, to marshal the assets, to determine what estate is first applicable, and what next, and this necessarily calls upon the Court to determine, among the different claimants and holders of the different portions of property, real and personal, claiming by the will and claiming by descent respectively, whose property shall be taken and whose

* This rule is now altered by the Revised Statutes c. 62, § 3.

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left. It raises questions between these several parties, to the extent of the whole amount required to be raised for the payment of debts. With such interests depending, in the questions to be decided, we think they may be deemed parties, entitled to appear and put forth and maintain their respective claims, and that being thus recognized as parties, if the decree is against them, they may consider themselves as parties aggrieved, and take an appeal from such decision.

Supposing the case then to be rightly before the Court, upon the appeal, the question is, whether under the circumstances shown, the executors ought to have license to sell the after-purchased real estate, before calling for and applying the personal. That this question properly arises, on a petition for a license to sell real estate, was settled in the case of *Hays v Jackson*, 6 Mass. R. 149. The Court are to grant license to sell real estate only in case the personal, that is, the personal which is first applicable, has been applied; and when the petition is to sell a particular class or kind of real estate, it must be a good answer for those interested, to show, that there is other estate unapplied, which by force of the will, or by the operation of law, is first applicable. In effect, therefore, the Court must, upon such petition, marshal the assets, in order to determine whether the executor shall have license to sell any real estate, under the circumstances appearing, and if so, which kind or portion of the real estate, as affecting the various claimants, in the character of legatees, devisees and heirs.

In considering this question, we are first to examine the will. It is perfectly manifest, we think, that it was the intention of the testator, that his wife should hold all the personal property he should leave, subject to certain specific deductions for other legatees, and this exempt from the payment of debts. This results from the absolute and unqualified gift of the personal property, without charging it, or considering it chargeable, either in terms or by implication, with the payment of his debts; and by directing that his debts should be paid out of another fund, arising from proceeds of real estate in New York, directed by him to be sold, and devised to his executors in trust for that purpose. That the testator considered

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this fund amply sufficient for the purpose, is manifest from this, that he charges other large specific legacies upon the same fund, and then devises the residue of it, in such terms as to show that he still considered the gift of the residue as a beneficial gift. It clearly results from these views, we think, that it was the intent of the testator, that his wife should have the personal estate exempt from all charge for the payment of debts. Can this intent be carried into effect, consistently with the rules of law.

It appears that after this will was made, the testator sold the lands in New York, which, by the will, were made a fund for the payment of debts. From this fact, it is argued by the counsel for the heirs, and the argument is certainly entitled to great weight and consideration, that as this sale of the land thus appropriated as a fund to pay debts, was a revocation of the will *pro tanto*, the legal effect of this was to withdraw and annihilate the fund out of which it was originally provided, that the debts should be paid, and thus to throw the liability for debts back again upon the personal property, as the first fund chargeable by law, for their payment. But we think the argument fails on several grounds. In the first place, the alienation of the estate charged with the payment of debts, operates as a revocation of the will only collaterally and consequentially, by operation of law; and we think it would be pressing a mere inference of law beyond its just bearing, to infer from this sale a change of intent, beyond what necessarily follows from the fact. The fact of such alienation shows no change of the original intention of the testator to give the personal property to the wife exempt from debts. Suppose the testator had said in terms, that his wife should take all the personal estate, exempt from debts, and had indicated no fund from which the debts should be paid; still if he left other estate not exempted, on which they could be charged, as if he held real estate at the time of the execution of his will, not devised by it, we see no reason why the undevised real estate shall not be taken, before the personal, which has been bequeathed by the owner, having a right by law so to dispose of his estate. The reason why the intent of the testator shall not in all cases be carried

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into effect is this, that creditors have a paramount claim to all legatees, devisees and heirs ; and therefore if a testator manifests his intent ever so strongly, as if he were to give all his real and personal property specifically, and exempt from the payment of debts, such intent must be wholly inoperative as against creditors. Some of the property clearly intended to be given to devisees and legatees, must be taken, and then it becomes a question among those standing upon an equal footing, so far as the beneficent intent of the testator is concerned, and then a different rule may prevail. But no such reason applies, when other funds exist, applicable by law to the payment of debts, arising either from undivided property, or from after-acquired property, or any other source. There the intent of the testator may prevail, without defeating or impairing the claims of creditors, and there seems to be no reason why it should not. The original intent of the testator, that his wife should have the personal property to her own use, is very manifest. It appears from the will, that he was without children, and that his estate was to go to collateral heirs, and that he intended to make a liberal provision for his wife. But except the use and improvement of certain real estate, he gave her no property, subject to her own disposal, except the personal property by the legacy in question. After the alienation of the real estate, he leaves his will, unrevoked, unaltered and without republication. There is a fund applicable by law to the payment of debts, in the after-purchased real estate, the application of this will not disturb or defeat the purposes of the will, and, therefore, we think it should be first applied.

The rule seems distinctly recognized in the case of *Hays v. Jackson*, 6 Mass. R. 149, though the facts differed. There the devise to Mrs. Swan was in terms residuary, and made subject to the payment of the testator's debts. And on that ground it was held, that such residuary estate must be taken before the descended, or after-purchased estate. It went upon the ground, that nothing was given to her, except what should remain after the debts were paid. But the Court say, as there was no specific bequest of any chattel, and no exemption of any part of the personal estate from the payment of debts,

such estate was first to be applied, clearly implying, that if such personal estate had been specifically bequeathed, or otherwise bequeathed absolutely and specially exempted, it would not have been applied before the descended estate. The same doctrine is confirmed by the case of *Seaver v. Lewis*, 14 Mass. R. 83. It proceeded on the ground, that it did not sufficiently appear by the will, that the testator intended to provide a fund for the payment of debts for the purpose of exempting the personal estate.

We take the rule now to be well settled, that as the personal estate is the first fund applicable to the payment of debts, it will not be exempted in favor of the legatee, unless it appears from express words or necessary implication, from the whole will, that it was the intention of the testator so to exempt it. But when it appears to have been the intention of the testator to provide for the payment of debts by a sale of real estate, and not merely by a general charge of debts on the real estate, there the proceeds of such real estate shall be first applied. *Hancox v. Abbey*, 11 Ves. 179 ; *Burton v. Knowlton*, 3 Ves. 107 ; *Brummel v. Prothero*, 3 Ves. 111.

In the present case, the testator bequeathed his personal estate, not by a residuary clause, but as an absolute bequest, and he devises property in trust to his executors and directs them, out of the proceeds, to pay his debts. This, we think, manifests a clear intention of the testator to give the personal property to his wife, exempt from liability to pay debts.

Then the only question is, how is the result affected by the events, which occurred after the making of the will, viz. the alienation by the testator in his lifetime, of the estate thus given in trust for the payment of debts, and the purchase of other real estate. The Court are of opinion, for the reasons already assigned, that this alienation of the estate is not evidence, that the testator had altered his intention, that the personal estate should go to the wife, exempt from the payment of debts. Then the only question is, whether descended real estate shall go for the payment of debts before personal property absolutely bequeathed, and intended to be exempt from the payment,

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and the Court are of opinion, that the descended real estate should be first applied. *Livingston v. Newkirk*, 3 Johns. Ch. R. 319. The general rule is laid down in *Hays v. Jackson*, that descended or undevisee real estate, shall be applied before personal property specifically bequeathed or bequeathed free from liability for the payment ; and the latter is the present case.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND
HAMPDEN, SEPTEMBER TERM 1836,
AT NORTHAMPTON.

PRESENT.

HON. LEMUEL SHAW, CHIEF JUSTICE,
 HON. SAMUEL PUTNAM, }
 HON. SAMUEL S. WILDE, } JUSTICES.
 HON. MARCUS MORTON, }

PERSIS DEWEY *versus* FREDERICK MORGAN

A testator, after devising one third of his real estate to his wife for her life, and reciting, that he had hitherto done something for his children when they were setting out in the world, according to his abilities, gave to his children, including F., the tenant, one dollar each, and then proceeded as follows : " And I constitute and appoint my son F. sole executor of this my last will and testament, and I give unto my son F. my wearing apparel and the whole of the farming utensils," &c. ; and it is my will, that my said executor collect in all the money or debts I may have due to me at my decease, and also pay out and settle all the debts I may owe at my decease, and when my estate is all settled by my said executor, it is my will, that the remainder all go to my said son F." At the time when the will was made, the testator also executed a deed of a parcel of his real estate to the tenant, and gave it to a third person, to be delivered after the death of the testator. The testator was possessed of no other personal property than that described in the will. The tenant lived with him for more than twenty years preceding his death ; and no one of his other children lived with him during that period. It was *Add*, that the remainder of the real estate of the testator passed to F. in fee, by the residuary clause of the will

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WRIT of entry. The parties stated a case.
The demandant and the tenant were children of Reuben Morgan, who died in 1811

Reuben Morgan, by his will, devised to his wife the improvement of one third part of all his real estate, during her life, and the whole of his household furniture, &c., to be at her own disposal; and after reciting, that "whereas, heretofore, I have done something for my children, when they were setting out in the world, according to my abilities," he gave to his children, including the demandant and the tenant, the sum of one dollar each. The testator then proceeded as follows: "And I constitute and appoint my son, Frederick Morgan, sole executor of this my last will and testament, and I give unto my son, Frederick, my wearing apparel and the whole of the farming utensils, viz. such as carts, ploughs, chains, axes, &c. of all kinds; and it is my will, that my said executor collect in all the money for debts I may have due to me at my decease, and also pay out and settle all the debts I may owe at my decease; and when my estate is all settled by my said executor, it is my will, that the remainder all go to my said son Frederick."

At the time of the execution of the will, the testator being seised of two several tracts of land, the one of the value of \$1000, and the other worth from \$1500 to \$1800, made a deed of the first mentioned tract to the tenant, and gave it to a third person, to be kept by him with the will, until after the testator's death, when it was to be delivered to the tenant. The deed was accordingly delivered to the tenant after the death of the testator. At the time of his death he was possessed of no other personal property than that described in the will.

The tenant had lived with the testator from a time soon after he was twenty-one until the testator's death, the tenant then being forty-six years old. Their property in stock, tools, &c. were distinct, though kept in the same barn and houses. At the time when the tenant came of age, all the other children of the testator were married and living away from him, excepting one daughter, and she was married soon after and moved away.

The demandant, as one of the heirs at law, was entitled to

one eighth part of the land described in the declaration, unless it was otherwise disposed of in the will.

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The Court were to give such judgment upon these facts, as should be conformable to law.

Wells and Atwood, for the demandant.

Sept 27th.

Brooks, for the tenant.

Sept 30th

SHAW C. J. delivered the opinion of the Court. The question in this case, depends altogether upon the construction of the will of Reuben Morgan, the father of the parties. If the operation of the will is, to give the residue of his estate to the tenant, it is conceded, that the present action, in which the land is claimed by descent, as intestate property, by the demandant as heir at law to her father, cannot prevail.

In construing a will the intent of the testator is to govern, unless repugnant to the rules of law ; and the whole is to be taken together. Another rule applicable to the present case is, that the exact grammatical sense and collocation of words, will not govern, to the exclusion of the apparent intent, reading the language conformably to its general scope ; and this consideration is the more important, when it is manifest that the will is illiterate.

The Court are of opinion, reading this will, subject to the guidance of these rules, that the testator intended to dispose of his whole estate, and that after the specific bequests, it was his intention to give the whole of his remaining property to his son, Frederick.

This construction undoubtedly renders nugatory some provisions of the will, such as the nominal legacy of one dollar to Frederick, and also the gift of certain personal property. But this is only an instance of that redundancy, which is often found, especially in illiterate wills, drawn by persons not conversant with rules of construction. The terms are, after specific directions to Frederick, as sole executor, "and when my estate is all settled by my said executor, it is my will that the *remainder all* go to my said son, Frederick." The construction is, all the remainder of my estate. The word *all* repeated strengthens this construction. The word "estate," is sufficiently broad, in its import, to carry real as well as personal property, unless limited or restrained by the context, or

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by some express or tacit reference to other provisions ; and in this will there is no such previous enumeration of personal property as to control the general words.

The recital, that the testator had done something for his other children, and his giving them nominal legacies, shows, that he did not intend to make an equal distribution among his children. The phrase "done something," probably originated in that caution, which avoids a more exact recital, lest the fact should be afterwards controverted by some of the children, and thus lead to family disputes. It was contended, that the word "remainder," in the last clause in the will, was so connected with debts and other matters of personalty, that it must mean the remainder of such personalty. But this argument is not well founded ; the clause immediately before the residuary clause in question, is a direction to collect what should be due to the testator and pay all the debts he might owe, a direction indeed wholly superfluous, because it would be his duty, without such direction. Then commences a separate and independent clause, already quoted : "And when my estate is all settled," &c. &c. The word "remainder" then, has reference to the whole of the will, and gives all not before disposed of. If it be held, that *remainder* must be property of the same kind which is given here, it is so ; he had given a freehold estate to his wife, in one third of his real estate ; then the remainder embraced the two thirds not given, and the remainder expectant on the termination of the wife's life estate, in the one third. The immediate antecedent to remainder is "estate" ; and in a will this word carries a fee.

The proof arising from the extraneous facts does not much vary this result. It shows a reason why the testator should have a particular regard for Frederick, who had remained with him many years, and give him a preference over those, who had been settled away from him.

The making of the deed can have no effect ; perhaps the testator erroneously supposed that a deed would be more effectual than a will to execute his intent. But whatever his view was, it is immaterial. Had the deed been to another person, as supposed in the argument, it would have presented a very different question.

Demandant nonsuit.

NATHANIEL FOWLE *versus* SAMUEL W. KIRKLAND

IN this case it was *resolved*, that before the action of account was abolished by the Revised Stat. c. 118, § 43, such an action was maintainable by a goldsmith and retailer of wares appertaining to that trade, against his former partner in the same business, who, after the dissolution of the partnership, became the receiver of moneys coming to their common profit, to render an account when requested.

It was also *resolved*, that where an action of account was commenced before that form of action was abolished by the Revised Statutes, it might be prosecuted to final judgment after they had gone into operation, the rights which the plaintiff acquired upon the commencement of the action being saved by the Revised Stat. c. 146, § 5.

Huntington, for the defendant.

Strong and Forbes, for the plaintiff.

HULDAH LANFAIR *versus* EPHRAIM LANFAIR.

Land was conveyed by L. to S., and at the same time an indenture was executed by the parties which set forth, that S. "demised, granted and to farm let" the premises to L., to have and to hold during the life of L., for the purpose, that S. should maintain L. for life; and that "the lease aforesaid is given by S. for the purpose of securing to L. the maintenance aforesaid." S. died in the lifetime of L. It was *held*, that the indenture was a mortgage; and that after the death of L. the widow of S. was entitled to dower in the land, as against a person claiming under S.

THIS was an action of dower.

By an agreed statement of facts it appeared, that previously to August 1827, the plaintiff was married to Samuel Lanfair; that on August 23d, 1827, Leonard Lanfair, being seised of the premises described in the writ, executed two warranty deeds purporting to convey the same to Samuel; but that the deeds were not delivered to Samuel until March 22d, 1828, on which day an indenture was executed by and between Samuel and Leonard, setting forth that Samuel, "for the consideration hereafter mentioned, &c. doth hereby demise, grant

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and to farm let, unto the said Leonard Lanfair, his heirs, executors, administrators and assigns," the premises in question, "being the same tracts of land, which the said Leonard Lanfair conveyed to me by his deeds dated the 23d day of August last past, for a particular description thereof reference may be had to said deeds, with all the privileges and appurtenances thereto belonging. To have and to hold the said demised premises, with their appurtenances, for and during the term of the natural life of the said Leonard Lanfair, from the day of the date hereof, to be complete and ended. It is to be remembered, that the abovementioned deeds by the said Leonard Lanfair, conveying the beforementioned premises to me, the said Samuel Lanfair, were given for this purpose, to wit, that I, the said Samuel Lanfair, should maintain the said Leonard Lanfair and his present wife, during the whole term of their natural life, and provide for them, during the whole of said term, sufficient and comfortable meat, drink, clothing, lodging, nursing and medical aid, both in sickness and health, suitable for their age and circumstances in life, with the use of such part of the dwellinghouse upon the premises as may be necessary for their use, and such as they may choose. And the lease aforesaid is given by me the said Samuel Lanfair, for the purpose of securing to the said Leonard Lanfair the maintenance aforesaid."

Samuel, with his wife and family, lived on the premises, and took care thereof, from October 1st, 1827, until his death, in September, 1830. Leonard remained on the premises in the family of Samuel, until December 11th, 1827, at which time he was married; and after that time he continued to live in the house, together with his wife, performing such labor as he was able and chose to do, and being in part supported by Samuel from the produce of the farm, until the death of Samuel.

It further appeared that Samuel died insolvent; that on October 12th, 1830, Sylvester S. Newcomb was duly appointed administrator of his estate; that Leonard, among other creditors of Samuel, exhibited a claim against his estate, consisting of charges for labor and articles sold, a part of which was added to the list of claims against the estate, by the determination of

referees duly appointed ; that in pursuance of a license from the Probate Court, the administrator, on June 18th, 1833, sold and conveyed all the title and interest of Samuel in the premises to Orlando Ware, by a deed reserving and excepting all the rights of Leonard, and also any right of the plaintiff to dower therein ; that on May 29th, 1834, Ware released and quitclaimed all his right and interest in the same to the defendant ; and that the defendant was in possession thereof by virtue of this conveyance, on the 8th of July, 1835, when the plaintiff demanded of him to have her dower assigned to her therein.

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Leonard, after the death of Samuel, had the exclusive possession of the premises until his own death, which took place in April, 1835, he having ordered the plaintiff to quit the same. The widow of Leonard lived with the family of the defendant.

If the Court should be of opinion, that the plaintiff was entitled to dower as claimed in her writ, the defendant was to be defaulted ; otherwise the plaintiff was to become nonsuit.

Alvord and R. E. Newcomb, for the plaintiff, to the point, that if the indenture was to be considered as a lease for life to Leonard, carved out of the fee, it did not bar the plaintiff's right to dower, as in such case Samuel, after the execution of the indenture, continued to be seised of the remainder, which was a valuable interest, cited *Nash v. Preston*, Cro. Car. 190 ; Bac. Abr. *Dower*, B 3, note, cites Co. Litt. 32 a ; to the point, that the defendant had no right to dispute the seisin of the plaintiff's husband as he derived his title from him, *Bancroft v. White*, 1 Caines's R. 185 ; *Kimball v. Kimball*, 2 Greenleaf, 226 ; *Hitchcock v. Harrington*, 6 Johns. R. 290 ; *Collins v. Torrey*, 7 Johns. R. 278 ; *Hitchcock v. Carpenter*, 9 Johns. R. 344 ; and to the point, that this indenture, being made at the same time when the deeds were delivered to Samuel, instead of being a lease for life, was in fact a mortgage, and if so, that the plaintiff was clearly entitled to dower, *Hildreth v. Jones*, 13 Mass. R. 525 ; *Bolton v. Ballard*, 13 Mass. R. 227 ; *Bird v. Gardner*, 10 Mass. 364 ; *Snow v. Stevens*, 15 Mass. R. 278 ; *Goodwin v. Richardson*, 11 Mass. R. 169 ; *Barker v. Parker*, 17 Mass. 564 ; *Walker v. Gris-*

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wold, 6 Pick. 416 ; *Carey v. Rawson*, 8 Mass. R. 159
Coates v. Cheever, 1 Cowen, 478 ; *Fish v. Fish*, 1 Connect.
R. 559 ; *Clark v. Henry*, 2 Cowen, 324 ; *Wilder v. Whittemore*, 15 Mass. R. 262 ; *Colman v. Packard*, 16 Mass. R. 39 ; *Parks v. Hall*, 2 Pick. 211.

Grennell and Brainard, for the defendant. By the execution of the indenture, Samuel reconveyed a freehold estate in the premises to Leonard, and consequently he was seised but for an instant. His widow is, therefore, not entitled to dower. *Holbrook v. Finney*, 4 Mass. R. 568.

After the conveyance by Samuel of an estate for life to Leonard, Samuel was seised of only a vested remainder, of which a widow is not dowable. *Eldredge v. Forrestal*, 7 Mass. R. 253 ; *Fisk v. Eastman*, 5 New Hamp. R. 240 , Co. Litt. 32 a ; *Duncomb v. Duncomb*, 3 Levinz, 437 ; 1 Fearn on Cont. Rem. 509.

The indenture was not a mortgage. To constitute a mortgage, there must be a condition of defeasance. *Moore v. Esty*, 5 New Hamp. R. 479.

It is said, that the defendant is estopped to dispute the seisin of Samuel, as he derives his title from him. The defendant does not deny, that Samuel had such a seisin as would enable him to give a title ; but he denies that he was so seised as to entitle his widow to dower. *Moore v. Esty*, 5 New Hamp. R. 479 ; *Kimball v. Kimball*, 2 Greenleaf, 226.

The reservation in the deed to Ware cannot create any title to dower, not existing before.

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PUTNAM J. delivered the opinion of the Court. The main question is, whether the plaintiff is entitled to recover her dower in the estate of Samuel Lanfair, her late deceased husband ; and that question depends upon the fact, whether or not he was seised, during the coverture, of such an estate in the premises whereof his widow was dowable. There would be no doubt in the case if it depended entirely upon the deed of Leonard to Samuel Lanfair ; for that conveys a fee simple estate. But the case finds, that Samuel made an instrument under seal, granting a freehold estate to Leonard, at the same time when the deed of Leonard to Samuel was delivered

These deeds are to be construed together, in order to arrive at their true meaning and legal effect.

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On the part of the tenant it is contended, that as Samuel, the grantee, reconveyed a freehold estate in the premises, he was seised but for an instant, and if so, his widow is not dowerable; that after the conveyance to Leonard of the freehold estate, Samuel Lanfair was seised only of a vested remainder, of which a widow is not dowerable; which result would follow, if Samuel, during the coverture, had only a seisin of a vested remainder of a fee simple.

The demandant contends, that the tenant derives his title under the administrator of the estate of Samuel, and that the right of the demandant to dower was reserved and excepted in the deed of the administrator to the grantor of the tenant, whose rights were acquired by the tenant, subject to such exception and reservation.

The demandant further contends, that the instrument made by Samuel to Leonard was in effect a mortgage, and that the estate of Leonard, the mortgagee, has determined by his death, and so the demandant is entitled to dower in the same, as she would have been if no such deed of mortgage had been given. The tenant denies that the instrument given by Samuel to Leonard was a mortgage, and relies upon *Moore v. Esty*, 5 New Hamp. R. 479, and *Fisk v. Eastman*, 5 New Hamp. R. 240.

The demandant further contends, that if the instrument of reconveyance was not a mortgage, yet inasmuch as it reconveyed only a part of the estate to Leonard, leaving Samuel seised of the remainder, which was a valuable interest, it disproves the allegation of instantaneous seisin.

We proceed to examine the effect of the instrument given by Samuel to Leonard, to ascertain whether or not it is a mortgage.

It is to be construed with reference to the whole instrument, as connected with the deed of Leonard to Samuel, and as a part of the transaction. An enlarged and liberal, rather than a microscopic view, is to be taken, in order to ascertain and carry into effect the intent of the parties. It expresses, upon its face, that it is given by Samuel to Leonard Lanfair for the

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purpose of securing to Leonard the maintenance, which Samuel was to provide for Leonard and his wife. It is a security. And this is a *sine qua non* of a mortgage. If the instrument be made as a security for the payment of a debt, or the performance of a duty, it is a mortgage. And the substance, and not the mere form, of the instrument is to be regarded. It is of no consequence, that it is called by a wrong name. The effect of the instrument will ascertain its legal character. The words employed by Samuel are, that he "doth hereby demise, grant and to farm let" to Leonard, the premises which Leonard had conveyed to Samuel, "to have and to hold the said *demised* premises, with their appurtenances, for and during the term of the natural life of the said Leonard." Now this is a grant of a freehold estate to Leonard; and if nothing more were contained in the instrument, it would be an absolute grant of a freehold estate. But there is much more and important matter, to show the purpose for which the grant was made. It is said, that the deeds by Leonard to Samuel, and the lease, (as it is called,) were given for this purpose, to wit, that "the said Samuel Lanfair should maintain the said Leonard Lanfair and his present wife, during the whole term of their natural life, and provide for them during the whole of said term, sufficient and comfortable meat, drink, clothing, lodging, nursing and medical aid, both in sickness and health, suitable to their age and circumstances in life, with the use of such part of the dwelling-house upon the premises as may be necessary for their use, and such as they may choose." Here the intent is manifest. If Samuel did what he undertook to do, then, by the operation of law, the instrument was to be void; but otherwise, in force. It is true, that those *words* are not written out, but the words before recited, viz. that the lease was given as security, &c. are inserted; and if a deed be given as collateral security, it would follow, that performance should divest the right of the grantee in the thing conveyed. Such a conveyance necessarily implies, that it is upon condition.

Now it could not be, and has not been questioned, but that a man may make a valid mortgage of an estate for life, or for years, as well as of an estate, or part of an estate, in fee

as collateral security. After a full consideration of the cases cited by the counsel, we are all very clearly of opinion, that the instrument before described, of Samuel to Leonard Lanfair, was, in legal effect, a mortgage upon condition to perform the duties therein set forth. So far as concerns the mortgage, the title of the mortgager is good, except against the mortgagee. The demandant has made no release of her dower. And the case finds, that Leonard Lanfair, the mortgagee, deceased long before this action was brought. So the freehold estate, which was mortgaged, has terminated. The claim of the demandant to dower is not now affected by that mortgage. The tenant does not claim any thing in the estate under Leonard Lanfair, but, as before stated, only under a conveyance by the administrator of the mortgager. But the claim to dower is paramount.

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Being all of the opinion before expressed, we do not think it necessary to decide upon the other points presented for consideration.

The judgment of the Court is, that the demandant is entitled to recover. And according to the agreement of the parties, the tenant must be defaulted.

WALTER B. MASON *et al. versus* THOMAS W.
THOMPSON and Trustee.

T. being indebted to B., a contract was made between them, in September, as follows : — " I, B., agree to purchase and do hereby purchase of T." a certain quantity of cheese, " if he makes as much," and certain cattle, at fixed prices, " T. to keep the cattle on his farm free of expense until foddering time, if there cannot be any sale made that will answer before ; the cheese to be kept until the 1st of November next, unless called for sooner ; and for the payment of the amount of these articles B. is to discharge all the claims he may have against T., and the balance he is to pay in cash whenever demanded." It was *held*, that this was not a present sale, but that as the articles were from time to time delivered, the contract was *pro tanto* executed, and that the property in the articles not delivered remained in T.

THE writ in this case was dated the 22d of October, 1834. Asahel Booth, the supposed trustee, stated in his answers, that, at the time of the service of the writ, Thompson was

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indebted to him on a balance of accounts, in the sum of \$120 ; that before that time, viz. on the 18th of September, 1834, a written contract was made between them as follows : — “ This certifies that I, Asahel Booth, agree to purchase of, and do hereby purchase of, T. W. Thompson,

8000 lbs. new milch cheese, if he makes as much,	
at 7½ cts. per lb., is	600 00
1 horse, - - - - -	75 00
1 horse, - - - - -	65 00
4 cows, - - - - -	60 00
1 yoke of oxen, - - - - -	60 00
	<hr/>
	\$ 360 00

the said Thompson warranting the above stock sound in every particular, and to keep them on his farm, free from expense, until foddering time, if there cannot be any sale made that will answer before. And we mutually agree, that there shall be twenty dollars swing on the property. That is, if the above property does not sell for the above amount, then the said Thompson is to deduct twenty dollars. And if it sells for twenty dollars more, after deducting charges for freight, &c. the said Booth is to allow and add twenty dollars more to the above amount. The said cheese to be kept until the first day of November next, unless called for sooner. And for the payment of the above sum the said Booth is to discharge all the claims he may have against the said Thompson, and the balance he is to pay in cash, whenever demanded. Colerain, Sept. 18, 1834 ;” that at the time of the service, the respondent had received one cow, and 5941 lbs. of cheese, which are credited in the accounts showing the abovementioned balance ; that after the service he received three cows and a yoke of oxen, of the value of \$ 105, which was all that he had ever received on the contract, though he had twice, at least, demanded of Thompson the remainder of the articles ; and that he had received notice, that such remainder had been assigned by Thompson to M. C. Howard and D. Donelson.

Sept 28th.

H. Chapman and Aiken, for the plaintiffs.

Wells and Alvord, for the respondent, contended the contract was not a sale, but an agreement for a sale ; *Jackson v.*

Myers, 3 Johns. R. 388; *Foster v. Foster*, 1 Lev. 55; *Goodtitle v. Way*, 1 T. R. 735; *Doe v. Clare*, 2 T. R. 739; that if it was an immediate sale, the property did not pass, because there had not been a delivery, but something remained to be done; *Davenport v. Wheeler*, 7 Cowen, 231; *Zagury v. Furnell*, 2 Campb. 240; *Owenson v. Morse*, 7 T. R. 64; *Hanson v. Meyer*, 6 East, 625; *Simmons v. Swift*, 5 Barn. & Cressw. 857; *Atkinson v. Bell*, 8 Barn. & Cressw. 277; 1 Wheaton, 84, note *d*; *Coit v. Houston*, 3 Johns. Cas. 254; *Outwater v. Dodge*, 7 Cowen, 85; *Macomber v. Parker*, 13 Pick. 175; *Andrews v. Ludlow*, 5 Pick. 28.

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MORTON J. delivered the opinion of the Court. The liability of the trustee depends entirely upon the construction of the agreement entered into between him and the defendant on the 18th of September, 1834. If the trustee is chargeable only with what he had actually received, the balance is in his favor. But if he is accountable for all the chattels mentioned in that agreement, then there is property in his hands for which he must be adjudged trustee.

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Was this a present sale of the property? Or was it an executory contract, by which the trustee prospectively agreed to become the purchaser? If the former, then the property changed owners immediately; if the latter, it was uncertain, and, like all other executory contracts, liable to be defeated by innumerable contingencies. Some of the language favors the one construction, and some the other. "*I agree to purchase*," seems to look to future action; "*and do hereby purchase*," strongly implies a present bargain; and both together, doubtless, favor the latter construction. But the meaning of an instrument is not to be determined by an adherence to the literal import of detached phrases, but by the fair construction of all the language together. This is the safest mode of ascertaining the intentions of the parties.

And in reading over the whole agreement, we entertain no doubt of its meaning. The parties could not have intended a present sale. Something remained to be done to transfer the property, and if it had perished in that state, the loss must have fallen upon the defendant.

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It is contended by the plaintiff's counsel, that, as between the buyer and seller, no delivery is necessary. But there must at any rate be a perfect contract of sale. The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point ; and if any thing remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale.

The general rule is, that where any operation, as surveying, weighing, measuring, counting, or the like, remains to be performed, in order to ascertain the price, or the quantity, or the parcel to be delivered, the contract is incomplete and the property does not pass. This is laid down by Brown on Sales, 44, and is supported by numerous authorities, many of which were cited in the argument. The stock had not been delivered, and could not be till a time subsequent to the service of the writ, because it was a part of the contract, that the former owner should support it. The cheese had not been delivered, and some of it had not been made, and it was uncertain whether it would be. It was not paid for, nor was there any indebtedness for the price, for by the contract it was not to be credited till delivered.

The same construction of the contract must apply to all the articles named in it. How could it be deemed a present sale of the cheese, when neither that nor the material of which it was to be made were then in existence, or, as far as could be known, ever would be ?

Nor is here any delivery which will give the slightest aid to the plaintiff's claim. The articles were, by the agreement, to be delivered from time to time, and as fast as they were delivered the contract was *pro tanto* executed, and the property vested in the trustee, and he became accountable for the price. But there is no pretence that the cow, or the quantity of cheese, was delivered for or as representing the whole.

And we cannot perceive how the principle with which the plaintiffs' counsel started can apply. Although a contract of sale may be good between the parties to it, yet here were assignees ; and property will not pass against the just rights of creditors or purchasers without a delivery. But it is not

necessary to rely on this ground, because we think it is abundantly evident that the parties themselves never intended to pass this property any sooner or farther than it was delivered.

Trustee discharged.

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THADDEUS TAYLOR *et al.* *versus* The COUNTY
COMMISSIONERS of Hampden.

Where public notice of a meeting of the county commissioners for the purpose of locating a highway and assessing the damages, was given in the manner prescribed by St. 1828, c. 103, § 8, [Revised Stat. c. 24, § 2, 6,] it was held, that it was sufficient as against the heirs of a person over whose land the highway was laid out, although such person died four days before the meeting, out of the Commonwealth, and none of the heirs resided, at that time, within the Commonwealth, or had actual notice.

PETITION for a certiorari. The petitioners were Thaddeus Taylor and Lydia his wife, and Caroline Flower, all of Suffield in Connecticut, and Eli Warner and Frances his wife, of Springfield. The petition set forth, that Lydia, Caroline, and Frances, were the only heirs at law of Robert R. Flower, late of Springfield, deceased; that on the 9th of April, 1833, Benjamin Jenks and others petitioned the county commissioners of Hampden county, to establish a highway extending from near the old Chicopee Bridge, in Springfield, to the Boston road in that town or Wilbraham; that on the second Tuesday of June, 1834, the commissioners, having adjudged such road to be of common convenience and necessity, passed an order, that they would meet on the 11th of November, 1834, for the purpose of locating the road, and hearing all persons interested in relation to damages, and that due notice thereof should be given to all persons interested, by advertisement, &c., fourteen days before the meeting; that such order was duly executed; that on the 11th of November, the commissioners proceeded to lay out the highway in part over the land of the heirs of Robert R. Flower, and awarded to such heirs the sum of ten dollars as their share of damages; that Flower, who was in full life when the road was adjudged to be of common convenience and necessity, was confined by sickness at the house of his

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father-in-law, in Suffield, from the 1st of November, until his death, which occurred on the 7th of the same month, being four days previous to the day on which the road was located, and the hearing had as to damages ; that the petitioners who were the only persons interested in the estate of the deceased, all resided in Suffield until May 14, 1835, and had no notice of the laying out of the road, or of the assessment of the damages, until after the expiration of the time, within which Robert R., if he had been living, ought to have applied for a jury, as the law in such case provides ; and that the damage by them actually sustained, amounted to the sum of \$ 200.

The petition further set forth, that at the first meeting of the county commissioners after the petitioners had notice of the location of the road and of the assessment of the damages, they presented their petition to the commissioners for a jury or for other relief in the premises, but the commissioners refused to sustain the petition, by reason of there having been one session previous thereto and subsequent to the location of the road. The petitioners, therefore, prayed the Court to cause the records, proceedings, &c., of the commissioners to be certified to them, to the end that the proceedings might be quashed.

Sept. 29th.

Wells and Willard, for the petitioners, cited *Wallop v. Irwin*, 1 Wilson, 315 ; *Scott v. Dickinson*, 14 Pick. 276, and cases cited ; *Commonwealth v. Coombs*, 2 Mass. R. 489 ; *Commonwealth v. Egremont*, 6 Mass. R. 491 ; *Commonwealth v. Cambridge*, 7 Mass. R. 158.

W. Bliss and Crooks, for the respondents.

Sept. 30th.

SHAW C. J. delivered the opinion of the Court. The specific object of this petition is to set aside the proceedings of the county commissioners, in locating and laying out, without due notice to the petitioners, a highway, which had been previously adjudged to be of common convenience and necessity. The petitioners state, that they are the heirs of Robert R. Flower, who died seised of an estate over which the highway passes, that very soon after notice was given by the commissioners fixing a time for laying out and locating the highway, Flower was confined by sickness at Suffield in Connecticut, and that he died four days before the day fixed for the location ; and they also state, that at that time they were residing at

Suffield, out of this Commonwealth. They insist, that on this account there was no person who could take notice of the proceedings of the commissioners, and represent their estate, and that in regard to that estate, the proceedings were *ex parte*. It is insisted on the part of the commissioners, that the petitioners had notice in fact, in sufficient season to have applied for a jury, or had some other revision of the proceedings : but we have not thought it necessary to go into that part of the case.

By *St. 1827, c. 77, § 7*, the commissioners are required to give notice to all persons interested, by various published notices, as therein particularly stated, before proceeding to adjudge a highway prayed for, to be of common convenience and necessity. By *St. 1828, c. 103, § 3*, when the commissioners shall have determined on the common convenience and necessity of laying out a highway, before they proceed to locate the same, they shall give the like notice required to be given before proceeding to view the route.

It is not denied, that in the present case the commissioners gave notice conformably to this last requisition. The complaint is, that Flower having died four days before the location, and the heirs being out of the Commonwealth, no notice, in fact, was had by the party interested.

The Court are all of opinion, that this objection to the proceedings cannot be sustained. Had the legislature intended that every proprietor over whose land the way passes should have personal notice, the statute would have so directed. But it is obvious to perceive what difficulties would arise from requiring the commissioners, who are public officers, charged with public duties, to ascertain the titles of all the lands traversed by the highway intended to be located, and on peril of rendering their proceedings erroneous, to give notice to the right person. We think the legislature intended to provide for a mode of constructive notice, which should bind all persons, by whatever titles they should hold, whether resident or non-resident, and whether they had long held their estates, or acquired them during the pendency of the proceedings. It may sometimes happen, that actual notice may not be received, but the legislature must have considered, that on the whole, it

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would operate to save the rights of parties, for all practical purposes. It is made constructive notice by force of the statute, and is to have the force and effect of actual notice.

In the present case, the petitioners, as heirs of Flower, immediately on his decease, became seised of the estate by descent, and might have appeared before the commissioners. If they did not, in fact, have notice of the proceedings, before the actual location of the highway, or before the assessment of the damages, by the commissioners, it was a misfortune arising from the operation of the law, not from any default or error of the commissioners, and it cannot, therefore, affect the validity of their proceedings.

Petition dismissed.

SETH WILLIAMS *versus* The Inhabitants of CUMMINGTON.

It seems, that if the inhabitants of a town, in making a county road, deviate from the true location, they are estopped, in an action against them for an injury occasioned by its being out of repair, to deny their liability to maintain it as they have made it.

The erection and support of a bridge by a town and the use of it by the public, for thirty-eight years, is sufficient proof of its existence as a highway, on the presumption of a laying out, a grant or a dedication, to render the town liable for an injury occasioned by its being out of repair. [And see Revised Stat. c. 25, § 26.]

THIS was an action upon St. 1786, c. 81, § 7, to recover double damages for an injury occasioned by the defects of a bridge in Cummington, alleged to be upon a county road leading from the baptist meetinghouse in that town to Windsor.

At the trial, before *Wilde J.*, the plaintiff offered in evidence the record of a county road between these termini, surveyed and established in 1797, and he proved that the road and the bridge upon it were soon after constructed where they now are, and that the defendants have ever since maintained them there. The defendants denied that the bridge was upon the county road as located, and by a survey according to the record, proved that the bridge was some rods aside from it. The jury were instructed, that the defendants could not set up

this mislocation of the road in defence of the action, and that the evidence was sufficient to show that the road as travelled had been dedicated to the public. If this instruction was correct, judgment was to be entered on the verdict.

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Bates, Dewey and Huntington, for the defendants, contended, 1. that a user contrary to the record, was insufficient to establish a county road; and 2. that a user for less than forty years will not have that effect. *Odiorne v. Wade*, 5 Pick. 421; *First Parish in Gloucester v. Beach*, 2 Pick. 60, note; *Hinckley v. Hastings*, 2 Pick. 162; [but see 2d edit. Perkins's note;] *Reed v. Northfield*, 13 Pick. 95; *Kent v. Waite*, 10 Pick. 138; *St. 1786, c. 67, § 7*.

Forbes, for the plaintiff, cited *Gayety v. Bethune*, 14 Mass. R. 55; *Hill v. Crosby*, 2 Pick. 466; *Commonwealth v. Newbury*, 2 Pick. 60; *Commonwealth v. Low*, 3 Pick. 408; *Sargent v. Ballard*, 9 Pick. 251; *Livett v. Wilkinson*, 3 Bingham. 115; *Cincinnati v. White*, 6 Peters's Sup. Court R. 631; *Pomeroy v. Mills*, 3 Vermont R. 279; *Abbott v. Mills*, 3 Vermont R. 521; *State v. Catlin*, 3 Vermont R. 530; *Pritchard v. Atkinson*, 4 N. Hamp. R. 1; *Rowell v. Montville*, 4 Greenleaf, 270; *Todd v. Rome*, 2 Greenleaf, 55; *Estes v. Troy*, 5 Greenleaf, 368.

MORTON J. delivered the opinion of the Court. It is very clear that the use of the bridge by the public and the erection and support of it by the town for thirty-eight years, is sufficient proof of its existence as a highway.

Oct. 1st

It may well be doubted, whether a town, which, in making and repairing a highway, has by accident or design deviated from the true location, should be allowed to deny their liability to maintain it as they have made it. It would be a dangerous imposition upon the public, and their conduct should be deemed an estoppel *en pais*.

Long occupation and enjoyment unexplained, will raise a presumption of a grant, not only of an easement, but of the land itself; and not only of a grant, but of acts of legislation and matters of record. And grants may be presumed not only to individuals and corporations, but to the Commonwealth. The statute of 1786, c. 67, § 7, was not intended to affect the existing modes of acquiring ways, public or private, but only

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to establish the boundaries between existing ways, and public fields, and the adjoining owners.

Here were facts from which a laying out, a grant, or a dedication, might be presumed. The authorities cited by the plaintiff's counsel fully support all the above positions.

Judgment on the verdict

GIDEON AMES *versus* SAMUEL PHELPS.

In an action of trespass by a mortgagee of personal property against an officer who attached the property at the suit of a creditor of the mortgager, it was *held*, that the certificate of the town clerk on the mortgage that it had been duly recorded in his office, could not be disproved, as against the mortgagee, by the production of a copy of the supposed record differing materially from the mortgage itself.

TRESPASS against the defendant, who was a deputy sheriff, for taking two horses. The defendant justified the taking, on the ground that they were attached by him as the property of Roderick Shewbrooks, by virtue of several writs.

At the trial, before *Wilde J.*, the plaintiff claimed title under a mortgage made to him by Shewbrooks previously to such attachment, in which the property was described, as "one span of large bay horses I bought of Chamberlain." Possession was not taken and kept by the plaintiff under the mortgage; but the original mortgage was certified to have been recorded by the town clerk of Belchertown, where Shewbrooks lived at the time when the mortgage was made. On the production of the record, it appeared that it contained, instead of the words above quoted, the following, to wit, "one share of a large bay horse I bought of Chamberlain." There was evidence tending to prove, that previous to the attachment, the defendant was informed that the horses were included in the mortgage, and that he examined the record for the purpose of satisfying himself on the subject; that he was informed there must be some mistake, but designedly neglected to go to the plaintiff to ascertain the fact.

The jury were instructed, that if the defendant had reasonable ground to believe, that there was a mistake in the record and designedly neglected to make further inquiry, he made the

attachment at his peril, although he did not know with certainty and of his own knowledge, that the horses were included in the mortgage.

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The jury returned a verdict for the plaintiff; and the defendant excepted to the ruling of the court.

R. A. Chapman, for the defendant.

Sept. 27th.

Wells and *Lawrence*, for the plaintiff.

SHAW C. J. delivered the opinion of the Court. On producing a copy of the record from the town clerk's office, by the defendant, a considerable discrepancy is obvious, between the original mortgage, and the registration of it, and the question which has been mainly argued is, whether the difference in the two, is so great as to take away the proof of identity, and enable the defendant successfully to hold, that the mortgage actually relied on by the plaintiff, is not proved to have been recorded. But the Court are of opinion, that there is a question behind this, which must supersede it, and that is, whether it is competent for the defendant to disprove the truth of the register's certificate, by a production of the copy of the record. The original mortgage is certified to have been recorded by the town clerk, who, for this purpose, is the regular certifying officer; the mortgagee relies upon it and has good reason to rely upon it, as a valid security. It is like the return of an officer, and cannot be impeached or controlled, by producing the supposed record and showing a variance. The plaintiff is entitled to recover.

Oct. 1st.

LESTER DICKINSON *versus* CHARLES S. GRANGER.

A partnership between the plaintiff and the defendant having been dissolved, the plaintiff agreed to pay all the debts against the company, and the defendant agreed, in writing, that a certain sum was the final balance of accounts between them as partners. It was *held*, that the plaintiff might, before paying the outstanding partnership debts, maintain assumpsit against the defendant, to recover the sum thus agreed to be the final balance, the defendant, if compelled to pay any of such debts, having his remedy on the plaintiff's agreement.

ASSUMPSIT to recover a final balance due to the plaintiff, on a settlement of the affairs of a partnership which had existed

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Granger. between him and the defendant. The suit was defended by subsequently attaching creditors.

At the trial, before *Wilde J.*, the plaintiff produced an agreement signed by the defendant, as follows : " It is hereby agreed, that on the 14th day of October, 1833, there is due to Lester Dickinson the sum of \$ 324.49, as the final balance of accounts between us as partners. C. S. Granger." The writ was dated October 15th, 1833. The plaintiff here rested his case.

The attaching creditors then introduced their evidence, and their counsel argued to the jury, that the foregoing agreement was fraudulent, inasmuch as the proof, that there were outstanding debts against the firm, and the other evidence in the case, showed that the agreement was not entered into until after the commencement of the action. The plaintiff contended, that the jury had a right to infer from the evidence, that before the commencement of the action the partners settled the partnership concerns, and that the plaintiff had agreed to pay the outstanding debts, and that thus the final balance was arrived at, and that from all the evidence it did not appear that the agreement was fraudulent.

The judge instructed the jury, in point of law, that if they should find from the evidence, that before the action was brought, it had been arranged that the sum above mentioned was the final balance by the plaintiff's agreeing to assume the outstanding debts, and if they were convinced that such was the agreement on the part of the plaintiff, they might return a verdict for the plaintiff.

The jury found a verdict for the plaintiff.

Sept 20th. *H. Morris, Dwight and R. D. Morris*, for the creditors, cited *Fanning v. Chadwick*, 3 Pick. 420 ; *Williams v. Henshaw*, 11 Pick. 79, and 12 Pick. 378.

Chapman and Ashmun, for the plaintiff, cited *Hobart v. Howard*, 9 Mass. R. 304 ; *Brinley v. Kupfer*, 6 Pick. 181.

Oct. 1st. MORTON J. delivered the opinion of the Court. This action is between two persons recently partners, and the object of it is to recover the balance of a partnership account. The question is, whether assumpsit will lie. The subject has often been before the Court, and though our rule, which was adopted

before our chancery jurisdiction was extended to such cases, differs a little from the English and New York rules, yet it is now perfectly well settled and will not be changed. It was definitively laid down in *Williams v. Henshaw*, 11 Pick. 82, in which may be seen the principal authorities, as follows, "that *assumpsit* will lie to recover a *final balance* of a partnership account; and that this extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them."

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A *final balance*, which of course can never arise till after a dissolution, may be created by the express agreement of the parties, or may grow out of the settlement of the partnership concerns, where the law implies a promise by the partner holding the funds to pay to his copartner one half of all that remains in his hands after the whole transaction is closed, and all the outstanding debts paid off. Here the jury, under the instructions given to them, found a settlement of the balance and an express promise to pay it. That this promise may be enforced, we have no doubt. On the adjustment, the plaintiff agreed to pay all the outstanding debts. This was not a condition precedent to the undertaking. If the plaintiff neglects to pay them, he will violate this agreement. And if he does this, and the defendant is compelled to pay any of them, he will have an action upon it, and the measure of damages will be, not the one half, as if they were partners, but the whole of the amount paid.

According to these principles were the instructions to the jury. They being correct, and no objection being made to the sufficiency of the evidence to support the verdict, judgment must be rendered upon it.

The Inhabitants of the FOURTH PARISH IN WEST
 SPRINGFIELD *versus* HARVEY ROOT *et al.*

The defendants and others, inhabitants of a parish, subscribed for the purchase of a bell, to be raised and hung in the parish meetinghouse under the direction of a committee of the subscribers, and the parish voted, "that the subscribers for a bell have leave to place the same in a convenient place in the meetinghouse to be rung," and that it "should be the property of the subscribers, subject to their control and direction." After it had been hung up in the meetinghouse for several years, and had been rung, during that time, for all parish purposes, it was removed by the defendants. In an action of replevin by the parish against the defendants, putting in issue the plaintiffs' title to the bell, it was *held*, that as the record of these votes, which was contained in a book purporting to be the parish records, was admitted in evidence at the trial, as a parish record, without objection, and made a part of the case, it could not be afterwards objected by the parish, that such record was not attested by the parish clerk; that it was immaterial, so far as regarded the rights of the parish, whether the warning of the meeting at which such votes were passed, was strictly in pursuance of law or not, as the votes showed how and when the bell was received, and so rebutted the presumption of any other acceptance by the parish; and that such votes rebutted any presumption of a donation to the parish, which might, perhaps, otherwise be raised from the unexplained possession and use of the bell by the parish.

THIS was an action of replevin for a bell and bell frame. The defendants pleaded property in six of the defendants, and traversed the property of the plaintiffs. Issue was joined upon the traverse.

At the trial, before *Wilde J.*, the plaintiffs proved, that the bell and bell frame, before they were taken by the defendants, had been hung up in the plaintiffs' meetinghouse for the space of eight years, and had been used by them, during that time, for all parish purposes.

The defendants produced in evidence, the following subscription paper: "We, the subscribers, inhabitants of the fourth parish of West Springfield, feeling desirous that there should be a bell procured for the meetinghouse in said parish, do agree to pay to some person, to be appointed by a majority of the subscribers present at a meeting to be holden at the meetinghouse in said parish on the first day of September next, immediately after the close of the parish meeting upon said day, the several sums set against our respective names, to be appropriated to the purchase of a bell of a suitable size and quality, to be placed in said meetinghouse, to be purchased by

a committee to be appointed at said meeting by the major part of the subscribers present, and to be raised and hung in said meetinghouse under the direction of said committee. The several sums by us subscribed, to be paid on demand after said first day of September. West Springfield, August 25th, 1826. Donation, \$ 50." This paper was subscribed by the defendants and others.

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The defendants also offered in evidence the original warrant for a parish meeting, to be held on October 23d, 1826, "to see if the parish will permit the subscribers for a bell to put the same in a situation where it may be conveniently rung in said house, and pass all proper votes in relation to the same." They further produced in evidence a book purporting to be the parish records, and attested by the parish clerk in various places, as the record of the proceedings of the parish, and it was admitted without objection and made part of the case. These records did not expressly state, that a meeting was held on October 23d, 1826, but after the record of the warrant, they set forth, that it was voted, "that the subscribers for a bell have leave to place the same in a convenient place in the meetinghouse to be rung," and "that the bell should be the property of the subscribers, subject to their control and direction." The record of this meeting was not attested by the parish clerk.

The parish had at various times raised money to defray the expenses of ringing the bell; but when there was no occasion to raise money for other purposes, these expenses were defrayed by a subscription raised indiscriminately from the members of the parish, including the defendants.

A nonsuit or a default was to be ordered by the Court, as the case might require.

Wells, Boise and Alvord, for the plaintiffs, to the point, that by the terms of the subscription paper, the bell and bell frame when purchased, became the property of the parish, and that they might maintain this action, cited *Lent v. Padelford*, 10 Mass. R. 230; *Watson v. Cambridge*, 15 Mass. R. 286; *Fellon v. Dickinson*, 10 Mass. R. 287; *Arnold v. Lyman*, 17 Mass. R. 400; *Colt v. Root*, 17 Mass. R. 229; *Baker v. Fales*, 16 Mass. R. 488; *Thompson v. Cath. Cong. Soc.*

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in *Rehoboth*, 5 Pick. 469 ; to the point, that the records of the meeting held on October 23d, 1826, were inadmissible in evidence, not being properly authenticated, *Saxton v. Nimms*, 14 Mass. R. 315 ; *Welles v. Battelle*, 11 Mass. R. 477.

Lathrop, I. C. Bates and Dewey, for the defendants.

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WILDE J. delivered the opinion of the Court. The plaintiffs proved at the trial, that the bell and bell frame replevied, had been in their possession for several years, and had been used by them during that time for all parish purposes ; and this undoubtedly was good *primâ facie* evidence of property. But this evidence was rebutted by the defendants, who proved, that the bell was purchased by subscription, the defendants and others being subscribers, and was by them hung up in the meetinghouse by the plaintiffs' permission.

This is conclusive evidence of property in the subscribers, unless there has been a donation of the property to the parish. At a meeting of the parish on October 23d, 1826, it was voted, "that the subscribers for a bell have leave to place the same in a convenient place in the meetinghouse to be rung." And it was voted also, that the bell should be the property of the subscribers, subject to their control and direction. These votes rebut any presumption of a donation to the parish, which might, perhaps, otherwise be raised from the unexplained possession and use of the bell by the parish.

It is objected that the record of this meeting is not attested by the parish clerk. But it was produced as the parish record, and as such was admitted in evidence without objection, and is made a part of the case. The book containing this record appears to be the parish book of records, and is in sundry places attested, as the record of the proceedings of the parish, by the parish clerk. Under these circumstances it is very clear that this objection cannot prevail.

It is immaterial whether the warning of the parish meeting were strictly in pursuance of law or not. For the votes show how and when the bell was received by the parish ; and this rebuts the presumption of any other acceptance of the supposed donation. If, therefore, the meeting was illegal, still there is no presumptive proof of the acceptance by the parish of such donation.

The taking, therefore, was lawful. A lessee at will, or a depository of goods for a time not limited, can maintain no action against the general owner, for taking them away. And besides, the parish voted that the bill should be subject to the control and direction of the subscribers; and moreover, the parties are at issue only on the question of property.

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Judgment for the defendants.

GEORGE MARSH *et al.* versus MARTIN DAY Junior.

Where a note was guarantied to be "good and collectable two years," it was *held*. that the guarantee was liable upon his contract, at any time after the note became due within the two years.

UPON a case stated, it appeared, that this action was assumpsit against the defendant, as the guarantee of three promissory notes, payable to the plaintiffs, two of them made by David N. Day, which were due before the 7th of August, 1833, and the third, which became due on the 7th of October, 1833, made by Day & Co. On each of these notes was an indorsement to the following effect: "Westfield, August 7th, 1833. Received of Marsh, Gilbert & Co. [the plaintiffs] fifty cents, in consideration whereof, I hereby warrant this note good and collectable two years. Martin Day, jr."

It was admitted, that previously to October 31st, 1834, which was the date of the writ in this action, the plaintiffs had commenced actions against the makers of the notes, but no property was found in their possession which could be attached.

At the trial, the defendant contended, that the action was prematurely brought; but the judge overruled the objection, and ordered a default, subject to the opinion of the Court.

Blair, for the defendant.

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W. G. Bates, for the plaintiffs, cited *Norton v. Eastman*, 4 Greenleaf, 521.

SHAW C. J. delivered the opinion of the Court. The only question is upon the construction of the defendant's guaranty, which being given upon a pecuniary consideration, was a valid one. The obligation of a guarantor or surety, is not to be

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extended beyond the plain scope of his undertaking. The defendant's undertaking is, in each case, to warrant the note good and *collectable*, two years. Two of the notes were then due and payable; the other was not due. The true construction of this contract, in the opinion of the Court, is, that the notes shall remain good and capable of being collected, for the term of two years. If, therefore, upon taking proper measures to collect them, at any time after they were due, within two years, they could not be collected, it was a breach of the defendant's promise, for which an action lies. The expression of the term of two years, we think, was to limit the extent of the guaranty, which would otherwise have been indefinite, and this construction is favorable to the guarantor.

Defendant defaulted.

DAVID RICH *versus* THOMAS LORD.

In construing releases, especially where the same instrument is to be executed by various persons, standing in various relations and having various kinds of claims against the releasee, general words, though the most comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the demands to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties.

A mortgager of real estate assigned his property upon the trust, that the assignees should, in the first place, pay certain of his debts in full, including a sum for the payment of which the mortgagee and one of the assignees were liable as sureties of the assignor, but not secured by the mortgage, and then the claims of such other creditors as should become parties to the assignment, *pro rata*, and embodied in the assignment a schedule of the property assigned, in which the real estate was described as subject to the mortgage, and also a schedule of the unpreferred creditors, in which the mortgagee was not mentioned; and the mortgagee executed a release, by which the creditors released the assignor "from all and singular their several claims and demands against him, of every name and nature." It was *held*, that the mortgagee did not thereby release the mortgage debt.

If the owner of an undivided portion of land, mortgage it, and the land remain in the possession of the mortgager or of a co-tenant, the mortgagee is entitled to partition, the possession of the mortgager or co-tenant being equivalent to possession by the mortgagee.

PETITION for partition. The petitioner represented, that he was seised in fee of one undivided half of certain land, to-

gether with a fulling mill, carding machine and clothier's shop, and the privileges and appurtenances thereof.

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The respondent pleaded, that the petitioner was not so seised ; and issue was joined thereon.

By an agreed statement of facts it appeared, that Madison D. Erskine and John Erskine junior were originally seised of the whole of the premises in question, as tenants in common, in equal parts ; that on March 1st, 1831, Madison mortgaged one undivided half thereof, to the petitioner, to secure the payment of three notes made by the mortgager and John Erskine junior, and payable at a time which had not yet arrived ; and that the petitioner had never been in possession, unless the possession of the mortgager or his cotenant was equivalent to a possession by the petitioner.

It further appeared, that on the 19th of October, 1832, the Erskines assigned their property to Alanson White, Asahel H. Bennett and Asaph Butterfield, upon the trust, that the assignees should sell the goods and chattels within one year from the date of the assignment, and collect the debts, and out of the proceeds thereof, after paying all expenses and charges incurred in or about the premises, and also several preferred debts, including " the sum of \$ 500 to Asaph Butterfield and David Rich, who stand jointly and severally engaged for us, the said John Erskine junior and Madison D. Erskine, in one note for that sum, to the Brattleborough bank, due and owing, with interest to the time of such payment," should pay the claims of the several persons named in a schedule annexed, together with all others to whom the assignors were justly indebted, *pro rat* ; provided they became parties to the assignment within thirty-five days from the date thereof. This part of the instrument of assignment was executed by the assignors. Then followed a schedule of the property, which, after describing the premises in question, continued as follows : " one undivided half of said land, buildings, fulling mill, one carding machine, clothier's shop, water and other privileges mentioned above, are subject to a mortgage [to the petitioner] of \$ 1217.02, with interest, annually, from the first day of March, 1831 ;" a schedule of the unpreferred creditors, " as far as recollected," they being few in number, and the name of the

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petitioner not being mentioned therein ; and an acceptance of the trusts and a covenant for the faithful performance of them, executed by the assignees alone. The assignment then proceeded, as follows : " And the creditors of the said John Erskine junior and Madison D. Erskine, in consideration of the covenants contained in the foregoing deed of assignment, do severally accept said assignment, and approve of the terms and conditions thereof, and in consideration thereof, they do severally release and discharge the said John Erskine junior and Madison D. Erskine of and from all and singular their several claims and demands against them, of every name and nature," &c. This release was executed by the creditors or some of them, including the petitioner.

The respondent acquired the title of the assignees, by purchase.

It appeared that no payment had been made on the notes secured by the mortgage. But the respondent contended, that by the release, these notes, and consequently the mortgage, were discharged. The petitioner contended, that the effect of the release was confined to the debts secured by the assignment, and that it was evident from the whole instrument, that these notes were not among the debts so secured and discharged.

The Court were to give judgment, upon these facts, according to the law.

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Wells and Alvord, for the petitioner, cited to the point, that the release did not operate to discharge the notes secured by the mortgage, *Payler v. Homersham*, 4 Maule & Selw. 423 ; *Solly v. Forbes*, 4 Moore, 448 ; S. C. 2 Brod. & Bing. 38 ; *Simons v. Johnson*, 3 Barn. & Adolph. 175 ; *Bruen v. Marquand*, 17 Johns. R. 58 ; *Jackson v. Stackhouse*, 1 Cowen, 122 ; *Lyman v. Clark*, 9 Mass. R. 275 ; *Emerson v. Knower*, 8 Pick. 66 ; *Nichols v. Arnold*, 3 Pick. 172 ; *Gloucester Bank v. Worcester*, 10 Pick. 528. [and see *Averill v. Lyman*, *post*, 346.]

Brooks, for the respondent. The petitioner is not entitled to partition because he was never seised of the premises, either actually or constructively, there being some one else in possession claiming the whole. *Bonner v. Proprs. Kennebec Purchase*, 7 Mass. R. 475 ; Co. Litt. 167 a.

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The petitioner has no interest in the premises, he having released the debt secured by the mortgage. The release is in broad and comprehensive terms, and applies to several as well as joint debts. *Emerson v. Knowler*, 8 Pick. 66; *Harrhy v. Wall*, 1 Barn. & Ald. 103; *Holmer v. Viner*, 1 Esp. R. 131. It is said, that no provision is made in the assignment, for the mortgage debt. But the assignment provides for the payment, *pro rata*, of the claims of the several creditors named in the schedule, *together with all others to whom the assignors were justly indebted*, upon their becoming parties to the assignment within a certain time. As the mortgage debt was mentioned in the instrument itself, there was no need of referring to it in the schedule. The release of the petitioner was wholly inoperative, unless it discharged that debt. The assignment makes provision for the liability of the petitioner to the bank, and he may have been induced to release his claim upon the real estate for that indemnity.

If the debt was discharged, no claim can be founded on the mortgage. *Vose v. Handy*, 2 Greenleaf, 322; *Gray v. Jenks*, 3 Mason, 520.

SHAW C. J. afterward drew up the opinion of the Court. The principal question in the present case is, whether the instrument executed by the plaintiff, as a creditor of Madison D. and John Erskine, is so to operate as to release the notes secured by the mortgage, under which he claims. It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent, every part of the instrument is to be considered.

As where general words of release are immediately connected with a proviso, restraining their operation. *Solly v. Forbes*, 2 Brod. & Bing. 39. So a release of all demands, then exist-

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ing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties. *Payler v. Homersham*, 4 Maule & Selw. 423. So where it is recited, that various controversies are subsisting between the parties, and actions pending, and that it had been agreed, that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was held, that though general in terms, the releases were qualified by the recital and limited to actions pending. *Simons v. Johnson*, 3 Barn. & Adolph. 175; *Jackson v. Stackhouse*, 1 Cowen, 126. So it has been held in Massachusetts, that where upon the receipt of a proportionate share of a legacy given to another, the person executed a release of all demands under the will, it was held not to apply to another and distinct legacy to the person himself. *Lyman v. Clark*, 9 Mass. R. 235.

In construing this release, according to the principles thus established, we think it manifest, that it was not intended to release the notes secured by the mortgage. The whole instrument is to be taken together. In this case the schedule is embodied into the instrument itself. The form of the instrument is in this respect peculiar. The first part, containing the assignment of the assignors, is executed by them; then come schedules, the acceptance of the assignment and the covenants of the assignees, which are separately executed by them; then the affirmation and acceptance by the creditors, and their release, which are separately executed by them. But they are all executed at the same time and constitute but one transaction. In the schedule of property assigned, which assignment, it will be borne in mind, was made by Madison D. Erskine and John Erskine junior, they include and describe the premises now in controversy, with this exception, viz. "One undivided half of said land, &c. are subject to a mortgage," &c., which is agreed to be the mortgage held by the plaintiff. By referring to this mortgage, it appears to be a mortgage of one undivided half of the premises by Madison D. Erskine, to secure to the

plaintiff, three notes signed by Madison D. and also by John Erskine junior.

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By making this conveyance subject to that mortgage, it is very clear that it was not the intent of the parties, that by the same act the mortgage should be discharged. But if the mortgage was to be kept up undischarged, the only obvious purpose of so keeping it, was, that it should stand as a security for the payment of the notes, and this by a clear implication negatives the intent, that the notes were to be released. Taking the whole instrument together, therefore, we think it very clear, that it was intended to except this mortgage and the notes secured by it, from the operation of the release, and that the general words of release must be limited and controlled by this manifest intent.

If it be said, that the plaintiff had no other subsisting demand, to which the release would apply, it may be answered, that in a long and complicated instrument, containing many provisions and stipulations, it is not necessary to suppose, that every one executing it has interests upon which every clause can operate. It is a sufficient reason for executing it, that he has any right, interest or power, upon which any part can operate, and his execution shall be referred and applied to such right, interest or power. Here it appears, that the plaintiff and one of the assignees stood as sureties for the assignors, on a note of \$500, at a bank, and that the assignment was made, among other things, in trust to indemnify the plaintiff against that suretiship. The plaintiff, therefore, standing as a *cestui que trust*, it was necessary, in order to give effect to the assignment for his benefit, that he should give his assent to it, by becoming a party. The motive and object of his becoming a party, therefore, may be presumed to have been, to give effect to the assignment for his benefit, *pro tanto*, and his execution, to express that assent.

The other points, we think, present no great difficulty. By the execution of the mortgage by one seised of the moiety, the plaintiff acquired a legal seisin and right of possession. The possession of the mortgager, or of the co-tenant, cannot be deemed adverse, but must be considered as the possession of the mortgagee.

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On the other point, we can perceive no difficulty in making partition by metes and bounds, if necessary, it being always competent to the commissioners, to make a division as nearly equal as practicable, without injury to the estate, and to make up for any necessary inequality by the payment of money.

But should it become necessary to make a special partition, in some mode other than that by metes and bounds, there would be no difficulty in making such partition. Revised Stat. c. 103, § 25, 26.

The petitioner entitled to partition as prayed for.

CHESTER SANDERSON *et al.* versus THOMAS WHITE *et al.*

The *St. 43 Ets. c. 4*, is in force here, at least so far as to determine what are gifts to charitable uses.

In the case of gifts in trust to charitable uses, no neglect, misapplication of funds or other breach of trust by the trustees, will give a right to the heirs of the donor to call upon a court of equity to declare a resulting trust for themselves. They have, therefore, no beneficial interest accruing from the non-execution of such a trust.

A testator gave certain property to trustees, in trust to be paid to them or their successors, whom they should name, and to be disposed of in the manner following: "the said sum shall be kept out at interest, &c. and the interest or annual income shall be applied to the pay or maintenance of a faithful, competent instructor of said school in Ashfield aforesaid; and I hereby request my said trustees to give to said institution an appropriate name, relying on the integrity and faithfulness of said trustees and their successors, to make from time to time such rules and regulations as they may believe the best adapted to insure success, always having a regard to virtuous and pious youth of genius in indigent circumstances." The trustees were subsequently incorporated, the act of incorporation providing, "that all grants and donations, which had been or should be thereafter made for the purpose aforesaid, should be confirmed to the said trustees and their successors in that trust, forever, for the uses which in such instruments were or should be expressed; provided such uses should not be repugnant to the design of this act." It was *held*, that the trustees were authorized to apply for and to accept such act of incorporation, the provisions of the act being calculated to carry into effect and not to defeat the objects of the testator; and that an application to this Court to compel the trustees to execute such trust, could not be sustained by the heirs of the testator, either as cestui que trusts or as visitors.

It seems, that trustees having themselves a visitatorial power, may, in case of any violation of law, be proceeded against either at law or in equity, as by *mandamus*, prohibition, information, or an action on the case. And where there are trustees in virtue of an express trust under a will, and where, therefore, they are within the equity jurisdiction of this Court, they are within its superintending power, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction of all abuses of trusts.

THIS was a bill in equity, filed by some of the heirs of Al-
 van Sanderson, formerly of Ashfield, against the executors of
 his will, and several other defendants appointed trustees under
 such will.

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The bill set forth, that the testator, on May 12th, 1817,
 made his will, in which, after making various bequests, he pro-
 ceeded as follows :

“ In the next place, believing I have some more property
 remaining to bequeath, I have seriously and deliberately, in
 the fear of God as I trust, thought upon a distribution of the
 remainder thereof, and upon reflection feel it to be a duty I
 owe to my merciful sovereign, to contribute and devote my
 mite further to promote learning, morality and piety, and as a
 convenient building has lately been erected near my dwelling-
 house in Ashfield, for the purpose of accommodating those
 youth who may be desirous of improvement, and as it may so
 happen, that the quarterly bills paid for tuition will not be suf-
 ficient to compensate and pay a qualified instructor, especially
 where there are some virtuous and pious youth of genius in
 indigent circumstances, who would esteem it a favor to be fur-
 nished charitably with tuition ; I do, therefore, hereby give,
 assign and set over to the Rev. Josiah Spaulding,” &c. “ my
 trustees, the one half of said building, together with the land
 extending two rods west and two rods south of said building,
 to them and their successors forever, in trust, as a schoolhouse,
 and as to the avails of the rest, residue and remainder of my
 real and personal estate, goods and chattels of what kind and
 nature soever, I give, assign and set over to my said trustees,
 in trust to be paid to them or their successors, whom they shall
 name, by my executors whom I shall hereafter appoint, and to
 be disposed of for the purpose and in the manner following,
 that is to say, the said sum, whatever it may be, shall be kept
 out at interest on good security, or otherwise, in whole or in
 part, vested, as the said trustees or their successors shall think
 best, in productive real estate, or in sure and permanent funds,
 and the interest or annual income shall be applied to the pay
 or maintenance of a faithful, competent instructor of said
 school in Ashfield aforesaid ; and I hereby request my said
 trustees to give to said institution an appropriate name, relying

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on the integrity and faithfulness of said trustees and their successors, to make from time to time such rules and regulations as they may believe the best adapted to insure success, always having a regard to virtuous and pious youth of genius, in indigent circumstances, hoping and praying that the Lord will raise up benefactors to this institution, and that the result may be the reclaiming the vicious, the instruction of the ignorant, and the promotion of true virtue and piety."

The bill further set forth, that the testator died on or about June 22d, 1817; that a large amount of property, at divers times, came into the hands of the trustees for the trust aforesaid; that the plaintiffs were advised, that they had a right to see that such trust fund was faithfully applied by the trustees, and to call them to an account for any misapplication of the funds or for any abuse of the trust; that the trustees, combining, &c. in order to injure the plaintiffs and the beneficiaries of such funds, refused to account for, appropriate, or vest such funds so in their hands to be applied according to the will of the testator, or to permit the plaintiffs to have access to any means of information relative to the appropriation and disposal of such funds, or otherwise to give any account of their proceedings in the premises, and disposed of and converted the funds, or a great part thereof, contrary to such will, and to their own use, and to purposes unknown. Wherefore the bill prayed, that the defendants might be compelled, as well to make discovery of all their doings under the will, and of the accounts and records of their proceedings, as to replace any sums of money by them withdrawn from the fund and appropriated contrary to the will of the testator; that the trustees might be enjoined thereafter to keep the fund at interest on good security, or otherwise vested in real estate, or in sure and permanent funds, under the direction of this Court, and to apply the interest or annual income to the payment of a faithful, competent instructor of such school; that they be also enjoined to permit their records and accounts to be inspected at seasonable hours by the heirs of the testator; and that the plaintiffs may have such further relief, &c.

The bill assigns, as a reason why all the heirs of the testator had not joined in the bill, that many of them had removed

to distant parts of the United States, and their places of residence were not known, and that some of them had refused so to join; and those who thus refused were made defendants.

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It was agreed, at the hearing, that the trustees accepted the trust, and received a certain amount of property from the executors; that some of the trustees having deceased, others were chosen by the survivors in their place; and that such trustees, with some others associated with them, were, with the consent of the original trustees, incorporated by an act passed on the 15th of June, 1821, [*St. 1821, c. 19,*] by the name of The Trustees of the Sanderson Academy and School Fund, for the general purpose of managing the funds bequeathed by the testator, and such other donations as might afterwards be made to them, to the amount therein limited.

The defendants demurred to the bill, and insisted that the plaintiffs, as such heirs, had no right to call them to an account, or to require a discovery of their proceedings; and by consent, the cause was argued on the demurrer, taken in connexion with the act of incorporation.

Dewey and Grennell, for the defendants. The question is, in whom is the visitatorial power over these funds vested. The common law respecting eleemosynary corporations is our law, except in particular cases, where it has been modified by statute. *Murdock, Appellant*, 7 Pick. 322. The visitatorial power is vested in the founders of ecclesiastical and eleemosynary corporations and their heirs, from the necessity of the case, where no other visitors are appointed, it being necessary that there should be somewhere a power to overlook the application of the funds. *Philips v. Bury*, 1 Ld. Raym. 5; 2 Kent's Comm. 240; *Dartmouth College v. Woodward*, 4 Wheaton, 564. But where visitatorial powers are vested in others by the founder of an institution or the legislature, the heirs of the founder have no authority to call the trustees to account. *Eden v. Foster*, 2 P. Wms. 325; *Green v. Rutherford*, 1 Ves. sen. 472; *Attorney-General v. Middleton*, 9 Ves. sen. 327; *Attorney-General v. Governors of the Foundling Hospital*, 2 Ves. jun. 47.

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In early times, the objects of the charity were often incorporated; and then the visitatorial power could not properly be

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exercised by them, but remained in the founder and his heirs. But if a distinct body from the cestui que trusts is intrusted with the funds, the founder has no visitatorial power, but the trustees are vested therewith. *Green v. Rutherford*, 1 Ves. sen. 472 ; *Fuller v. Plainfield Academic School*, 6 Connect. R. 532 ; *Philips v. Bury*, 1 Ld. Raym. 5 ; *Allen v. M'Keen*, 1 Sumner, 276.

In the present case the testator surrendered to the trustees the visitatorial power, without reservation ; and his heirs have no right to call the defendants to account for their proceedings. This Court, as a court of chancery, has a supervisory power over the doings of the trustees. Coop. Eq. Pl. 143.

Wells and Alvord, for the plaintiffs. The founder of this institution and his heirs have never parted with the visitatorial power. Where the trustees of an institution receive the revenues, they are always liable to account to the founder and his heirs for an abuse of their trust ; and they never can be visitors in such case ; for they cannot visit themselves. *Attorney-General v. Middleton*, 2 Ves. sen. 327 ; *Sutton's Hospital case*, 10 Co. R. 31 ; *Rex v. Bishop of Chester*, 2 Strange, 797 ; *Eden v. Foster*, 2 P. Wins. 327 ; *Dartmouth College v. Woodward*, 4 Wheaton, 518 ; *Allen v. M'Keen*, 1 Sumner, 276 ; 1 Bl. Comm. 484 ; *St. John's College v. Toddington*, 1 Burr. 200 ; *Rex v. Bishop of Ely*, 1 W. Bl. 71 ; *Attorney-General v. Griffith*, 13 Ves. 565 ; *Attorney-General v. Mayor of Rochester*, 2 Simons, 34 ; *Attorney-General v. Lock*, 3 Atk. 165 ; *Moggridge v. Thackwell*, 1 Ves. jun. 464 ; *Fisher v. Ellis*, 3 Pick. 326.

The cestui que trusts could undoubtedly sustain this application to the Court. *Hadley v. Hopkins Academy*, 14 Pick 240. If the claimants of the bounty of the testator could maintain a bill to enforce the performance of the trust, it would seem to follow, that the founder and his heirs might do so.

The visitatorial power of the testator and his heirs was not taken away by the act of incorporation. *Dartmouth College v. Woodward*, 4 Wheaton, 638.

SHAW C. J. afterward drew up the opinion of the Court. [After stating the facts.] In the first place, it is perfectly clear, that it is a gift to a charitable use, and as such enti

ded to the protection and subject to all the provisions of law governing gifts to charitable uses. Since the passage of the act, 43 *Eliz. c. 4*, it has been an established rule, that all gifts are to be deemed charitable, which are enumerated in that statute as such, and none other. That statute expressly includes all gifts for schools of learning, free schools and scholars of universities. This statute passed before the emigration of our ancestors, and being made by way of declaration and amendment of the common law, has been acted upon in this Commonwealth, as far as it was applicable to our state and condition, and as far as our judicial tribunals have been competent in point of jurisdiction to execute and carry its provisions into effect. We consider the statute to be in force here, at least so far as to determine what are gifts to charitable uses. *Morice v. Bishop of Durham*, 9 Ves. 399 ; *S. C.* 10 Ves. 522.

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Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish and carry into effect the intent and purpose of the donor; and trusts which cannot be supported in ordinary cases, for various reasons, will be established and carried into effect, where the trust is raised in support of a gift to a charitable use. If no executor or trustee is named, in ordinary cases the gift would fail, but in cases of charity the want will be supplied by appointment by a court of equity. *Mills v. Farmer*, 1 Meriv. 54.

But the distinction the most material to the present case is this, that where the purposes of the gift are vague and uncertain, and where the persons are uncertain, the gift will either be declared void for uncertainty, or if the gift and the trustee be sufficiently explicit, but the object of the trust vague and uncertain, it will be declared in ordinary cases a resulting trust for the heirs at law or distributees. But in case of a gift to charitable uses, this will never be done. In all such cases, the legacy will be sustained, and where a literal execution may become impracticable or inexpedient, in part or even in whole, it will be carried into effect so as to accomplish the general purpose of the donor, as nearly as circumstances will permit, and as such general charitable intent can be ascertained. From this view of the law governing gifts in trust to charitable uses,

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it is manifest that no neglect, misapplication of funds, or other breach of trust, will give a right to the heirs at law to call upon a court of equity to declare a resulting trust for themselves, and, of course, that they have no pecuniary or beneficial interest accruing from the non-execution of such a trust. They do not, therefore, stand in the relation of *cestui que trusts* calling upon the court, as a court of equity, to enforce the performance of a trust in their favor.

Considering, then, that the plaintiffs cannot assert and enforce their claim as *cestui que trusts*, the only ground upon which they can sustain their claim is, that the defendants constitute a lay, eleemosynary corporation for the carrying into effect a perpetual charity, by the promotion and encouragement of a school for young men of genius, who need the aid of the charitable to assist them in their education; and they rely upon the rule of the common law, that when an eleemosynary corporation is founded by an individual, and no visitor is appointed, the founder and his heirs forever are visitors of common right, and they assert the right to enforce the execution of the trusts of the will of their ancestor, under this claim of the visitatorial power.

This rule itself is accurately stated by Lord Holt, in his celebrated judgment in the case of *Philips v. Bury*, 2 T. R. 352. In considering what is the nature of a visitor, he distinguishes between those for public government and those for private charity. "But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitors appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founders. *Yelv. 65; Fairchild v. Gaire*, 2 Cro. 60; where it is now admitted, on all hands, that the founder is patron, and, as founder, is visitor, if no particular visitor is assigned, &c. Further, this visitatorial power is an appointment of law, it is an authority to inspect the actions and regulate the behaviour of the members that partake of the charity. Now, indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain

trustees who dispose of the charity, according to the case in 10 Co., there is no visitor, because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and directions of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences, there is by law a visitatorial power." This principle has been recognized in many subsequent cases, in England and in this country. *Rex v. Master &c. St. Catharine's Hall*, 4 T. R. 233; *Dartmouth College v. Woodward*, 4 Wheat. 660, 674; *Allen v. M'Keen*, 1 Sumner, 300; 2 Kent's Comm. (3d ed.) 301.

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It may be observed, by way of preliminary remark, that though this may, and probably must, be considered as a rule of law in this Commonwealth, there is no practice and no precedent to guide in the application of it, this being, so far as I know, the first instance in which the right of an heir to visit an eleemosynary corporation founded by his ancestor, has ever been judicially drawn in question, either in a court of law or equity. The difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children male and female indefinitely, is such as would here render the rule one extremely difficult of application in practice, especially after a considerable lapse of time and many descents cast. The difficulty is well illustrated in the present case, where there are already, in the short period of twenty years, forty or fifty heirs of the donor. The rule, however, seems to have been recognized as in force in this Commonwealth, though it did not constitute the judicial decision. In *Murdock, Appellant &c.* 7 Pick. 322, *Parker C. J.* says, "by that law the power of visitor of all eleemosynary corporations is in the founder or his heirs, unless he has given the power of visitation to some other person or body, which is generally the case."

If, however, this be the law of the land, it must be so considered and applied, whenever a case is properly presented which requires its application, notwithstanding any practical difficulties attending it, and if such inconveniences are found to

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be numerous and formidable in practice, the remedy is to be sought in legislative interposition. It is peculiarly the province of the legislature so to amend the laws, from time to time, as to adapt them to such alterations as have been already made conformable to our general policy and state of society, that the rules of law may correspond with each other in one entire and harmonious system. For reasons hereafter given, it is not necessary to express any opinion on this point, in the present case.

Another obvious remark is, that the bequest of the testator was not made to the trustees as a corporation, nor was it provided in terms, that they should ask for, or accept an act of incorporation. Perhaps, however, taking the whole provision together, if it was not distinctly contemplated by the testator, that the trustees should become incorporated, it was not inconsistent with his purpose, or with the trust reposed in them. It has already been suggested, that the law goes to a great extent in supporting gifts to charitable uses. Where a gift is made with a view to found a hospital or college, not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the law will sustain it and carry it into effect. *Case of Sutton Hospital*, 10 Co. R. 32; *Attorney-General v. Bowyer*, 3 Ves. 714. In order to determine, whether an act of incorporation was inconsistent with the purposes of the testator, it is necessary to examine the provisions of the will more particularly. That object was avowed to be, to promote learning, morality and piety, by a school for youth desirous of improvement, by assisting to compensate and pay a qualified instructor, especially where there are virtuous and pious youth of genius, in indigent circumstances, who would esteem it a favor to be furnished charitably with tuition. The object is, in its nature, lasting and perpetual, and would be greatly aided by an act of incorporation. The property also is given in trust to certain persons and their successors, whom they shall name, without any limitation of number or prescribed mode of appointment, thereby leaving it to them to adopt any convenient mode, which would insure a perpetual succession. There is a further provision, that such trustees and their successors may make, from time to time, such rules and regulations as they may believe best adapted to insure success.

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With these large powers, and with this object in view, if the trustees named considered that an act of incorporation of themselves, and such persons of their nomination as they thought suitable, the best mode of securing a regular succession of trustees, a secure and faithful investment and administration of the funds, and a perpetual accomplishment of the design of the donor, they were authorized to ask for and accept such an act of incorporation, provided the provisions of such act were calculated to promote and carry into effect, and not in form or substance to defeat, the objects of the testator. The act in question seems to be of this character. After incorporating the trustees in usual form, by the name of the Sanderson Academy and School Fund, it provides that all grants and donations, which have been or shall hereafter be made for the purpose aforesaid, shall be confirmed to said trustees and their successors in that trust forever, for the uses, which in such instruments are or shall be expressed. That authority to hold other grants for the like purposes, to a limited amount, and that the acceptance of such grants, are not inconsistent with the intentions of the testator, is manifest from this ; that after enjoining a regard to virtuous and pious youth of genius, in indigent circumstances, he concludes by hoping and praying, that the Lord will raise up benefactors to this institution, and that the result may be the reclaiming the vicious, the instruction of the ignorant, and the promotion of true virtue and piety.

Supposing the trustees to have acted within the scope of their authority, in procuring an act of incorporation, so that they were constituted an eleemosynary corporation for the administration of the charity of the founder, still the questions recur : 1. Whether the plaintiffs can rightfully claim to act as visitors ; 2. Whether their remedy is by bill in equity ; and 3. Whether they show such a breach of trust on the part of the trustees, as will enable them to sustain the bill.

The rule as laid down above, and recognized in all the cases is, that the law appoints the founder and his heirs to be visitors, where he has not confided the visitatorial power to other hands ; but where he has done so, no such resulting power to the founder and his heirs, is raised by implication. In most cases of eleemosynary corporations the founders do not retain

Sanderson this visitatorial power in themselves, but assign or vest it in
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 institution. 2 Kent's Comm. 301.

It is not necessary that the visitatorial power should be given in terms; where that general control, superintendence and management of the institution is given, which essentially constitutes the visitatorial power, and especially where those thus intrusted with the management and control are not themselves the ultimate beneficiaries, there the power of visitors is in the overseers or trustees, and does not vest by implication, in the donor or his heirs. And this is the nature and character of most if not of all the colleges, academies and free schools which have been established in New England, and well enough accounts for the fact, that no question of this kind has ever before arisen.

In applying these rules to this will, it is manifest, that the trustees and their associates were not the persons ultimately intended to enjoy the benefit of the charitable donation of the founder. Whether this ultimate benefit is considered to enure to the use of the instructor of the institution, whose compensation is to be enlarged by the income from this fund, or the youth who are to receive gratuitous tuition in whole or in part, in either case the trustees receive nothing but the satisfaction of administering the donor's bounty.

And further, the power of general superintendence and management, that is, the visitatorial power, is confided to these trustees in the fullest manner. He authorizes them to invest the funds, as they shall think best, the interest to be applied to the pay or maintenance of a faithful, competent instructor of said school in Ashfield, and he requests them to give to said institution an appropriate name. The appointment and removal of the master was not given in terms, but it was by necessary implication, because they would pay such instructor only as they should judge faithful and competent. But another clause is still more express and explicit; "relying on the integrity and faithfulness of said trustees and their successors, to make from time to time such rules and regulations as they may believe best adapted to insure success." On both grounds, therefore, one, that the trustees themselves were not the ultimate objects of the donor's charity. and the other. the

large and ample power of control and management was confided to the trustees, we are of opinion, that no visitatorial power resulted to the heirs of the donor, and that they cannot maintain this suit.

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From this view of the subject, however, it is not to be concluded, that trustees having themselves a visitatorial power are beyond the reach and animadversion of the law. So far as the trustees are, from the terms of the will under which they hold, or from the nature of the objects to be obtained, vested with a power to act, that power is, in its nature, discretionary, and *quasi* judicial, and in the exercise of it, so far as they act with good faith, no other tribunal will or can control them. But in case of any violation of law, they may be proceeded against by any suitable and appropriate process, either at law or equity, as by writ of *mandamus*, or prohibition, by information, or by an action on the case, where that remedy is appropriate. And where there are trustees, in virtue of an express trust under a will, and where, therefore, they are within the equity jurisdiction of this Court, they are, it seems, within the superintending power of a court of equity, not as if itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction of all abuse of trusts, to redress grievances and prevent and suppress frauds. In such case, the interests of the public, or what is the same thing, of the general and indefinite objects of the charity, would be represented by the attorney-general. Chancellor *Kent*, in his excellent treatise, says, it is also well understood, that the court of chancery has a jurisdiction over charitable corporations for breaches of trust. 2 *Kent's Comm.* 304.

This opinion renders it unnecessary to consider, whether this bill could have been sustained in its present form, inasmuch as it does not allude to the fact of the incorporation of the trustees, or charge them in their corporate capacity; and upon that point we give no opinion. Perhaps this error, if it might have been considered one, was an error of form only, and open to amendment.

On the whole, the Court are of opinion, that the plaintiffs have no right, either as *cestui que trusts*, or as visitors, to require the discoveries and accounts sought for in the bill, and that the bill be dismissed, with costs.

CEPHAS COBB *versus* THE HAMPSHIRE AND HAMPDEN CANAL COMPANY.

Two individuals having contracted with a canal corporation to construct the canal on the line on which it had been duly located under the act of incorporation, to find all the materials and to pay all damages for land taken for the canal, with a stipulation that, by the consent of the corporation, the line of the canal might be altered, these contractors, together with other persons, for the purpose of speculation in real estate, entered into an agreement with the demandant, by which he granted them liberty to construct the canal through his homestead, in a line deviating from the original location, in consideration whereof he was to have the right to retain his title, claiming no damages, or within a fixed period to convey to them his homestead for a certain price. A canal was made accordingly over the demandant's land, and afterwards the agreement was rescinded in order to place all the parties to it in the same situation as if it had never been made. The corporation subsequently made use of this portion of the canal, and in a writ of entry brought against them by the demandant, they pleaded a special non-tenure and disclaimer, by averring that they obtained a grant from the demandant, of a right to excavate, construct and use their canal and embankments over his land, and that under such grant they entered and excavated, &c., and acquired a right to occupy, use and improve the canal over the demanded premises, and that saving these rights they did not claim, &c. It was *held*, that the demandant's agreement with the contractors and others was no more than a personal license to those individuals, and that the plea was not sustained by the evidence.

THIS was a writ of entry against an incorporated company, to recover a messuage in Westfield, containing five acres of land. The writ was dated the 18th of January, 1834.

The tenants plead, as to one parcel (describing it) of the land demanded, that before they entered thereon, viz. on the 1st of April, 1828, by writing obligatory and in virtue of a contract in writing, which writing and contract are now in the possession of the demandant, or by him destroyed, they obtained from him the grant of a right to excavate, construct, and use a navigable canal, with necessary and proper embankments, in continuation of the canal adjoining the demanded premises, over and through the parcel described, and that under the grant they entered upon this parcel and there excavated and constructed the canal, and that they had and have the right to occupy, use, and improve the canal and embankments, over and along this parcel; and saving these rights and the right to keep the canal in repair, they do not and never did claim, and they disclaim, to have any other right or any thing else in such parcel

The demandant, in his replication, protesting that the tenants had not the right to excavate, &c., and that they have not the right to occupy, use, and improve, &c., says, that on the day of the purchase of the writ, they were tenants as of freehold of the demanded premises, and tenders an issue ; which is joined.

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At the trial, before *Putnam J.*, the tenants proved a contract, dated the 30th of September, 1826, between themselves and Thomas Sheldon and Davis Hurd, by which Sheldon and Hurd agree to do all the work and find all the materials for excavating and constructing the canal and feeders, from the south line of the State to the Connecticut river at Northampton, and pay all damages to which individuals should be entitled, and to finish the canal in 1829. The line of the canal had been previously located, pursuant to the tenants' act of incorporation, but there was a stipulation in the contract, that with the consent of two thirds of a certain committee of the corporation, the line might be altered.

They also proved a contract in writing, but not under seal, between the demandant, of the first part, and Sheldon, Hurd, S. Collins, and A. Painter, of the second part, dated the 6th of November, 1827, in which it is agreed, that Sheldon, Hurd, Collins, and Painter shall have liberty to construct the canal obliquely through the homestead of Cobb ; and in consideration thereof Cobb shall have the option to retain his title to the homestead, claiming no damages for any necessary injury thereto, or at any time previous to the expiration of two years from the completion of the canal as far north as Northampton, to convey the same to Sheldon, Hurd, Collins and Painter, for the sum of \$ 3500, to be paid in three annual instalments ; provided that he shall give ninety days' notice, and shall make the conveyance on the 1st of May, in the year in which he shall make his election to convey ; and if he shall not within the two years actually execute such conveyance, Sheldon, &c., shall be under no obligation ever after to pay for the same or respond in damages ; and if Cobb shall neglect to execute, on his part, the provisions of the contract, he shall pay to Sheldon, &c., \$ 1000, as compensation for damages in the case. The object of this contract was to accomodate Sheldon, Hurd, Collins

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and Painter, in a speculation in real estate in which they were engaged.

The canal had been located according to law a few rods west of the present route, and there was no evidence that that location had ever been altered, unless it so appears from the facts here stated.

Cobb never gave the ninety days' notice, mentioned in the contract, and Collins advised him not to convey the land, because from the failure of Collins, Sheldon and Hurd, he would probably lose all the consideration except the first payment. On the 6th of November, 1833, the contract was rescinded and destroyed by the parties, with the intention of placing them all in the same situation as if it never had been made. As the consideration of giving up the contract, Sheldon and Collins gave Cobb a bond to convey to him a small piece of land or pay him \$100, at their election. At the time when the contract was rescinded the homestead was not worth more than \$2,500. Collins testified that he considered the speculation an unprofitable one, and that the bond of Sheldon and himself was for a release to them from the obligation to take the homestead at a loss, and was not in compensation for the damage to the homestead.

The demandant contended, that the evidence did not support the plea, and that the tenants could not avail themselves of the contract between Cobb and Sheldon and others, unless they had by some corporate act located the canal in the place described in the plea, and had also assented to, assumed and ratified that contract.

The tenants then proved by parol evidence, the demandant objecting to its admissibility, that Hurd was their chief engineer, that he was in their employment at the period in question, that he authorized the construction of the canal, superintended the alterations in the route of the canal, directed where the surveys should be made, and directed a survey over the demandant's land, and the construction of a canal over the land described in the plea. The tenants also proved, that Sheldon and Hurd ceased to work on the canal in 1829, or to take any further care or management of the business, in consequence of the corporation having ceased to advance them funds. The

canal was constructed in 1828, across the demandant's land. Since Sheldon and Hurd abandoned the canal, the tenants have assumed the management of it from the State of Connecticut to Northampton, and it has been navigable from Westfield south to New Haven, since 1829, but has not been navigated over the demandant's land, except that in a few instances boats have passed over this ground. The same acts of ownership or superintendence were exercised over the part of the canal which passed over the demandant's land, as were exercised over other parts of the canal.

If the Court should be of opinion, that the tenants had supported their plea, the demandant was to be nonsuit ; otherwise the tenants were to be defaulted.

Mills, Wells, Alvord and W. G. Bates, for the demandant.

I. C. Bates, Boise and Dewey, for the tenants.

SHAW C. J. afterward drew up the opinion of the Court. The question submitted for the consideration of the Court is, whether the evidence set forth in the report is sufficient to support the plea of grant. This cause has been several times under the consideration of the Court, and they are of opinion, that the evidence is not sufficient to maintain the plea.

I shall not be able at the present time, and with no opportunity to refer to the authorities, to give all the grounds upon which this opinion is founded.

The plea alleges a grant of a perpetual easement by the plaintiff to the defendants, embracing not only an authority to enter and excavate the canal and raise the embankments, but a perpetual right to use and improve the same, for all the purposes of a public navigable canal. If this right is not established to the breadth and extent to which it is pleaded, the plea cannot avail. The claim is of a perpetual easement, to use the place for a canal with its embankments and towing paths, a use so entirely incompatible with any beneficial use to be made of the land by the owner, that it is in effect equivalent to a claim of the fee. It is pleaded as a grant by deed. The deed produced is a personal contract between the plaintiff Cobb, on the one part, and Sheldon, Hurd, Collins and Painter, on the other part, executory in its character, not containing in terms a grant to any person. The strongest construction which can be put

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upon it by the defendants is, that it amounted to a license to these individuals, to enter upon the land, and there to excavate and construct the Hampshire and Hampden Canal. But we think it would be a forced construction of this instrument, to hold it to have any greater force, at least until some further act was done, than to stand as a personal license to the individuals named. Had it not been rescinded, and had the location of the canal been legally altered, so as to pass in the direction which this deed was intended to give it, it might have operated to estop the plaintiff from claiming damages upon such location. But the location never was so altered, by any legal or binding act, and before any thing was or could be done, to give the defendants a claim to it, the contract itself was rescinded.

One point of view, in which the question presented itself to the Court, was this. Supposing this company, being authorized to excavate and build a canal, should contract with an individual to do the work, and pay all expenses, including damages for land, and such individual should procure a grant to himself personally, of the easement, to cut and for ever to use the canal, it would not of necessity enure as a grant to the individual to the use of the company, without any further act to be done by the individual to transfer such right to the company. But without deciding that question, which might be one of some difficulty and depend much upon circumstances, we think it founded upon a supposition, which the present case does not warrant. It presupposes that the location is established and fixed by law, and that the right is fixed, to acquire the easement, upon payment of the damages, and that the undertaker acts within the scope of his authority, by obtaining the grant of the easement, and actually making the canal on the line and at the place where it is fixed by law. In that case, the easement, that is, the right itself, to take and use the land for the public object of establishing a canal, would exist independently of the grant, in the company, and the grant would operate as a release only of all claim to damages, and such release would enure to those who had the right, who in the case supposed would be the company. But if the contractor and undertaker, not acting within the scope of his authority, should obtain from the owners of land a grant to enter, make and perpetually use a canal, on another

but though perhaps parallel to and near the one located, in the expectation, that by some future act such altered location would be adopted and accepted in lieu of the one located, it seems difficult to perceive how the company can avail themselves of such grant, until by some subsequent act the right is transferred and conveyed to them by the undertaker, who holds the right by deed. It is very clear, that the company would be under no obligation to pay the undertaker for any work done on such altered location, and if money is paid or advanced under such circumstances, it is done in their own wrong, and in confidence, that such after acts shall be done, and grants made, as may reconcile the legal and equitable claims of all the parties.

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In the present case, it appears that Sheldon and Hurd entered into a contract with the canal company to do all the work and find all the materials for excavating and constructing the canal and feeders, from the south line of the State at Southwick to the Connecticut river at Northampton, and pay all damages to which individuals should be entitled. But this contract was thus to construct the canal on the line fixed, and had reference to no other. There was a stipulation, that the line might be altered, but it was conditional, and the condition was never complied with. It was to be by the consent of two thirds of a certain committee named in the contract, and no such consent was ever given.

But there is another view of the subject. The contract with Cobb, was with Sheldon and Hurd, Collins and Painter. The two latter were wholly strangers to the defendants, the canal company. The two former were under contract with the company, to construct the canal, but at a different place. By the contract relied upon, it is recited, that it was agreed by Cobb, that Sheldon and Hurd, Collins and Painter, shall have liberty to construct the Hampshire and Hampden canal obliquely through his homestead, in consideration of which they agree to purchase his homestead at a price fixed, if he elects to sell it at that price, within a limited time, otherwise he is to claim no damage. The liberty is granted to them personally. The consideration proceeds personally from them. Even Sheldon and Hurd do not profess to act for the company, or to obtain the liberty or easement for them. There is no privity in

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fact or in law, between the plaintiff and the company. And the facts find, that the object of the contract was to favor a speculation in real estate, in which these four persons were engaged. They might have good reason to believe, considering their relation to the company, and the extent to which they themselves were stockholders, that the company would adopt and ratify their act, and then their object would be accomplished. But this contract, so far as it affected the rights of the company, was inchoate, executory and prospective, and a contract *inter alios*, under which no actual rights vested in this company. But before any such act was done, as would make them parties, or vest any right in them, the contract was rescinded by the mutual consent of the parties, and with the intent, as the case finds, to put all the parties in the same state, as if it never had been made. Under these circumstances the Court are of opinion, that this instrument cannot be relied on, as proof of a grant to the company, and that the plea is not supported.

**HORACE AVERILL *et al.* versus CHARLES LYMAN
*et al.***

Where, after the dissolution of a partnership between W. and C., a creditor of the firm stated an account in which they were charged with certain goods purchased by them, and, at the same time, stated a separate account of his dealings with W., who had assumed the adjustment of the partnership concerns, in which account W. alone was charged with another partnership debt, it was *held*, that C. was not discharged from such other partnership debt thereby; but that whether he was discharged or not, no one but C. could avail himself thereof, and a note given by C., either by way of security or satisfaction of such debt, would be founded on a good consideration.

Where an insolvent debtor made an assignment of his property in trust for his creditors, "a schedule and estimate of the amount of whose several debts is hereunto annexed," and the assignment contained a release, to be executed by the creditors, of "all sums of money due and owing or to become due to them respectively," "and also all their respective claims and demands whatsoever," and the name and the precise amount of one of the claims of a creditor, were inserted in the schedule, it was *held*, that such creditor did not, by executing the release, discharge a note recently executed by the debtor, as principal, and a third person, as surety, which was not included in the schedule.

ASSUMPSIT on a promissory note for the sum of \$200, made by Charles Lyman, as principal, and Zadock M. Lyman,

the other defendant, as surety, dated January 31st, 1834, and payable to Averill & Prior, the plaintiffs, in four months.

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The parties stated a case.

On December 15th, 1832, William and Charles Lyman, who were brothers and copartners in trade at South Hadley, being indebted to the plaintiffs in the sum of \$456, gave a note therefor, payable to the plaintiffs or their order, at the Hartford Bank. This note was sent to the plaintiffs, who were merchants in Hartford, by the promisers, enclosed in a letter, in which they stated, that they should probably want to renew the note for one half the amount.

On April 17th, 1833, William Lyman enclosed the sum of \$162, in cash, and a note for the sum of \$300, dated April 18th, 1833, signed, "For late firm of W. & C. Lyman, W. Lyman," and payable at the Hartford Bank in four months, in a letter to the plaintiffs, in which he stated that W. & C. Lyman had dissolved partnership, and he supposed the note, as written, was correct, as all the concerns of the firm were to be adjusted by him. The note was received at the Hartford bank, and entered upon the books as the note of W. & C. Lyman; and a memorandum was written on it, indicating that it was a renewal of the note for the sum of \$456.

On August 19th, 1833, W. Lyman sent the sum of \$104 in cash, and a note for \$200, signed by himself alone, and payable at the Hartford bank, enclosed in a letter to the plaintiffs, in which he requested them to receive the same as a payment of the note for \$300. To this the plaintiffs replied by a letter addressed to W. Lyman, dated August 21st, 1833, in which they stated, that they had credited him with the cash enclosed and the note for two hundred dollars, and charged him with \$300, "cash paid his note at bank," that they had found that the note for \$300 taken up by them on that day, was a renewal for one given in December, 1832, by W. & C. Lyman, that it was the undeviating rule of the bank, and likewise of themselves, to renew a note but once, that in this instance they had kept the note and paid the balance out of their own funds, which they hoped would soon be paid, and the new note be applied on W. Lyman's more recent account, and that they enclosed the note for \$300.

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On November 6th, 1833, the plaintiffs, by a letter of that date to W. Lyman, requested payment of the sum of \$ 200 paid by them on the note for \$ 300, at the bank, and also stated an account against W. & C. Lyman for goods purchased subsequently to the date of the note for \$ 456, and an account with W. Lyman. In the latter account W. Lyman was charged with \$ 196.20 cash paid on the note for \$ 300, and was credited with the note for \$ 200. The letter further stated, that they had applied the note for \$ 200 on account of goods bought in the spring.

On January 31st, 1834, one of the plaintiffs called on Charles Lyman for payment of the amount due them, and the note now in suit was then given. At the same time an account was rendered to the defendants, in which W. & C. Lyman were charged with "cash paid their note at bank, \$ 300," and credited with the sum sent them by W. Lyman in cash, on August 19th, 1833, and with the note now in suit.

In the autumn of 1833, Charles Lyman succeeded William in business. On February 7th, 1834, Charles, being indebted to the plaintiffs, on his individual account, in the sum of \$ 138.52, made an assignment of his property to trustees, upon the trust, after the payment of certain debts, to apply the residue of the trust money to the payment of creditors named in the assignment, including the plaintiffs, "a schedule and estimate of the amount of whose several debts is hereunto annexed," in proportion to the amount of their respective demands, provided they became parties to the assignment within four months from the date thereof. The assignment contained a clause whereby the creditors who became parties thereto, released to the assignor, "all sums of money due and owing, or to become due to them respectively from the said Charles Lyman, and all claims and demands they now have or may have hereafter for or by reason of having signed, indorsed or accepted any notes, bills or drafts for or at the request of said Charles Lyman, and also all their respective claims and demands whatsoever against said Charles Lyman." In the schedule referred to in the assignment, the sum of \$ 138.52 is placed against the names of the plaintiffs. The plaintiffs executed the assignment.

If, in the opinion of the Court, the plaintiffs were entitled to recover, the defendants were to be defaulted; if otherwise, the plaintiffs were to become nonsuit.

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W. Bliss, for the plaintiffs, to the point, that they did not, by executing the assignment, discharge the note now in suit, the general words of the release being qualified by the other parts of the instrument, cited *Rich v. Lord*, ante, 322, and cases there cited; that in order to determine whether the giving a negotiable note is a payment of a subsisting debt, the nature of the transaction is to be examined, and the intent of the parties ascertained, *Ellis v. Wild*, 6 Mass. R. 321; *Watkins v. Hill*, 8 Pick. 522; *Eagle Bank v. Smith*, 5 Connect. R. 71; *Bartsch v. Atwater*, 1 Connect. R. 409; *Davidson v. Bridgeport*, 8 Connect. R. 473; that if the note of W. Lyman for \$200, was not received in payment of the note for \$300, the plaintiffs could have sued the makers of the latter note for money paid by the plaintiffs, as indorsers, or by the request of the makers, and so there was a good consideration for the note, *Kean v. Dufresne*, 3 Serg. & R. 233; *Ramsdell v. Soule*, 12 Pick. 126; *Gough v. Davies*, 4 Price, 200; *Simson v. Ingham*, 2 Barn. & Cressw. 65; *S. C.* 3 Dowl. & Ryl. 249; and that if the note of W. Lyman was not a discharge of the note for \$300 by the laws of Connecticut, there was a good consideration for the note in suit, although our law might be different from that of Connecticut in this respect, *Pearsall v. Dwight*, 2 Mass. R. 84; *Blanchard v. Russell*, 13 Mass. R. 1; *Prentiss v. Savage*, 13 Mass. R. 20; *Wilson v. Clements*, 3 Mass. R. 11; *Flagg v. Upham*, 10 Pick. 147; *Kellogg v. Curtis*, 9 Pick. 534.

I C. Bates and *C. A. Dewey*, for the defendants, to the point, that the note in suit was discharged by the execution of the assignment on the part of the plaintiffs, cited *Holmer v. Viner*, 1 Esp. R. 132; *Russell v. Rogers*, 10 Wendell, 473; *Deland v. Amesbury Manuf. Co.* 7 Pick. 244.

SHAW C. J. delivered the opinion of the Court, (after stating the facts from the report.) Two questions have been argued in this case, to which the attention of the Court has been applied. The first is, whether the case discloses any good and legal consideration for this note. The foundation of this

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1837,
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debt was a note given by William and Charles Lyman, brothers and copartners, residing at South Hadley, payable to the plaintiffs, Averill and Prior, merchants at Hartford, or their order, at the Hartford bank, and there discounted. That it was expected to be discounted is manifest from the fact, that it was made payable at the Hartford bank, and because the makers stated, at the time, that they should probably want a renewal. When the note became due, the partnership had been dissolved, and William Lyman made a new note by way of renewal, for \$ 300, and forwarded it to the plaintiffs, the note purporting to be signed by William for and in behalf of the late firm. The balance of the former note being paid in cash, this was received and discounted as the note of the firm, by way of renewal.

One ground, upon which it is contended that the note in question was without consideration as against Charles, is, that William, after the dissolution, had no longer any authority to bind the firm by his contracts, and therefore, that this became the sole debt of William, and that Charles was discharged.

As a general rule, it is no doubt true, that after a dissolution, the authority mutually conferred by the partners on each other by the formation of the partnership is revoked, and that no new contract binding on both can be made by either, merely as such partners. But such an authority, general or special, may be conferred, by the terms of dissolution, or any other proper act. Here William Lyman professed to act for the late firm, stating that the settlement of its concerns had, by mutual agreement, been conferred on him. Such an authority may be proved, by showing either a prior act, or subsequent ratification. Here, without inquiring what is the direct proof of previous authority, there is full and uncontested proof of subsequent ratification by Charles, by assuming the debt. This still continued the debt of both. When this second note became due, William Lyman transmitted his own note to the plaintiffs, with cash to make up the balance, and requested them to receive this latter note for \$ 200 as a renewal in part. This they declined to do. They paid the note for \$ 300 at the bank, out of their own funds, and then William and Charles Lyman became jointly indebted to them, for so much money

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paid to their use. The cash, \$104, was credited. As to the \$200 note of William Lyman, they acknowledge the receipt of it, but instead of accepting it on account of the balance of \$300 paid at the bank, they propose to credit it on William Lyman's more recent account, and they request payment of the balance of cash paid at the bank. Thus far both partners continued liable.

The other fact mainly relied upon is, that in November 1833, the plaintiffs stated and forwarded two accounts, one with William and Charles Lyman, for a small account of merchandise purchased after the former note was given, and which had not been settled by notes, and another with William Lyman alone, in which the \$200, the balance of the \$300 paid in August, was charged. It is insisted, that, by this act, the plaintiffs took William alone as their debtor, and thereby discharged Charles. But the Court are of opinion, that such a change in the form of the account does not of itself vary the liability of the debtors. When the question is, to whom the credit was originally given, the form of the charge in the creditor's books, or on his accounts, may be very material evidence against him; but it is not in that case conclusive, but open to explanation. But here, the plaintiffs had been informed of the dissolution, that William had undertaken, as liquidator, to adjust the concerns of the firm and pay their debts, and had promised to do so. Making out the account in his name might be considered as merely provisional, to have effect in case he should pay. It is the form of a receipt, to be signed when the money, promised to be paid by the one, is paid. Such a payment would undoubtedly discharge Charles as well as William, because, before or after dissolution, satisfaction of a debt by either of the debtors enures by law to the discharge of both. In the case of *Barker v. Blake*, 11 Mass. R. 16, where, on the dissolution of a partnership, a creditor had transferred a balance due from the late firm, to the debit of the partner who had assumed the liquidation, and some transactions had taken place between them, still, on the failure of such partner, it was held, that the creditor might re-transfer the charge on his book to the old firm, and maintain a joint action so as to hold the out-going partner.

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But whether this mode of making out the account to William Lyman could, under any circumstances, have been relied upon, as a discharge of the other partner, no one but Charles could avail himself of it, and he has waived it, because when the account was again made out against William and Charles Lyman, in January, 1834, Charles admitted it, by giving his own note for the amount, with Z. M. Lyman as a surety.

I have thought it proper thus to state my views, showing that up to the time of the settlement of this last account, Charles Lyman had never ceased to be responsible for this debt, lest, if a shorter and more summary view of the law had been taken, it might give countenance to the supposition, that Charles Lyman had been exonerated, either by the note given by William for the firm after the dissolution, or by the account once made out by the plaintiffs to William alone.

But it seems to me very clear, that there is another and decisive answer to this objection of want of consideration, and that is, that it is wholly immaterial whether Charles Lyman remained responsible for this debt or not. If he chose to give his own note, either by way of security or as satisfaction and discharge of the debt of William Lyman, and did do so, it cannot be said, that such note was without consideration. If it was in satisfaction and discharge, then the release of the claim of the plaintiffs on William Lyman is a perfectly good consideration; if it was by way of security, when paid it would enure by way of discharge of the claim on William Lyman, and the effect would be the same, as a consideration.

The other point in this case is one of more legal difficulty; it is, that after the making of this note, and whilst it was held by the plaintiffs, they executed a release to Charles Lyman, broad enough in its terms to include and cover this note; and it is very clear, that the release of one of two joint debtors is a release of the debt, and enures to the discharge of all.

This note was given on January 31st, 1834, at four months. On February 7th, Charles Lyman made an assignment of his property to trustees, for the payment of debts. It appears, that in the autumn of 1833, Charles Lyman succeeded William in business, and on February 7th, 1834, was indebted to Prior & Averill in the sum of \$138 52. The indenture of

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assignment, after certain preferred debts, provides for the equal and proportionate payment of sundry creditors named, among whom ~~are~~ Averill and Prior, the plaintiffs, "a schedule and estimate of the amount of whose several debts is hereunto annexed." On the schedule is put down, "Averill & Prior, Hartford, \$138.52." The words of the release are very general, of "all sums of money due and owing, or to become due to them respectively, from the said Charles Lyman," "also all their respective claims and demands whatsoever."

The general rule in regard to the operation of releases, is, that where there are general words of release embracing in terms all demands, if it manifestly appears, from the whole instrument taken together, that a particular demand was within the recital or consideration, it shall be intended that the words were to extend to such demand. As in all other cases, the intent is to govern. In an instrument prepared to be signed by many creditors, it is not to be presumed, that the situation and circumstances of each particular debt, and each and all of the creditors, is in the contemplation of the person who draws the instrument. The clauses are so drawn as to meet the circumstances common to the cases of all the creditors. Particular debts may be so secured by indorsers, or by collateral security, on real or personal estate, that it is not reasonable to suppose that it was intended to discharge them. Still, if it is clear from the whole instrument, that they are not excepted, they will be included. But if, from the recital or otherwise, it can be reasonably inferred, that they were not intended to be released, the general words will be modified and controlled accordingly. The general principle was considered and some of the leading authorities were cited, in a case, in which the opinion of the Court has been recently given. *Rich v. Lord*, ante, 322.

In applying the rule to the present case, it seems to me very clear, that the operation of the release must be confined to the several debt of Charles Lyman, because taking the whole instrument together, it was the intent of all the parties, that is, the assignor, the plaintiffs, and the other creditors, that it should be so limited. The note, though the several debt of Charles Lyman to some purposes, was also the joint debt of Charles and Z. M. Lyman. The latter being a surety, on a

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note very recently given, that note may have been considered as well secured, in which case it is not to be presumed, that the holder will relinquish it, on receiving a composition, possibly a very small dividend. But the decisive circumstance is, that the debt mentioned in the schedule, corresponds precisely with the separate, distinct, simple contract debt, unsecured, due from Charles Lyman alone to the plaintiffs. Where a schedule is thus referred to as modifying and controlling the terms of the instrument, it is to be deemed as if embodied and made a constituent part of it. Suppose instead of a schedule, there had been a recital, setting forth that whereas Charles Lyman was indebted to several firms and persons, in the several sums following, to wit, &c., and then the assignment and release had followed, in the same terms, which were used in the present. The plaintiffs could have claimed a dividend only on the amount thus stated, and the release would have been limited to the same.

This rule, however, is not to be applied to a case, where there is a schedule, when it is manifest, that all debts of certain descriptions are intended to be embraced, though misstated in the schedule, unless limited to the precise amount stated in the schedule, and on which there are not separate parties, or separate security, or some other distinction, in the nature and character of the demand. The distinction here is, that the schedule precisely includes one separate unsecured debt of Charles alone, which leads to a satisfactory inference, that a distinct secured debt due from Charles and another, was not in the contemplation of the parties.

HORACE ADAMS *versus* SYLVANUS GRAVES *et al.*

In trover against two defendants, jointly, for a horse hired of the plaintiff to go to a certain place, it is competent for the defendants to prove, that by a contract between them, one was to carry the other to such place as a passenger, there being no direct evidence of any express hiring by the latter.

A deposition taken under a commission directed, in the common form, to any justice of the peace, &c. is admissible in evidence, although it does not appear, that the person before whom the deposition was taken was a justice of the peace, otherwise than by his signature upon the deposition.

It seems, that where a commission to take depositions, is directed to a person by name, it is immaterial whether he has any official character or not, as he would have sufficient authority to take the depositions, from the commission itself.

TROVER for two mares. At the trial, in the Court of Common Pleas, before *Williams J.*, the plaintiff offered evidence tending to prove that the two defendants, Graves and Clapp, hired of the plaintiff the mares in question, together with a wagon, to go to Hinsdale in New Hampshire; that they drove the mares to Chesterfield, a town seven miles beyond Hinsdale; and that on their return the mares were much injured.

The defendants contended, that the mares were hired by Clapp alone; that Graves was a mere passenger, and not responsible in any event; and that by the original contract, the mares were to go to Chesterfield.

There was no direct evidence of any express hiring by Graves; and the defendants offered in evidence the testimony of two witnesses, which tended to prove, that on the day previous to the departure of the defendants for Chesterfield, Clapp agreed with Graves to carry him and his wife to Chesterfield for seven dollars.

The plaintiff objected to the admission of this testimony, unless it should be shown that the knowledge of this fact had been communicated to him. But the objection was overruled and the testimony admitted.

The defendants also offered in evidence the deposition of Hannah Fiske, taken by virtue of a commission in the common printed form, directed "to any justice of the peace, &c. in New Hampshire." The plaintiff objected to the admission of this deposition, because, as he contended, it did not appear, that Larkin G. Mead, before whom the deposition was taken,

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was a justice of the peace, and it was incumbent on the defendants to show that fact by other evidence than the signature of Mead himself, upon the deposition. This objection also was overruled, and the deposition admitted.

The jury returned a verdict in favor of both defendants, and the plaintiff thereupon excepted to the rulings of the Court

Oct 1st. *R. A. Chapman and Ashmun*, for the plaintiff, as to the first objection, cited *Merrill v. Sawyer*, 8 Pick. 397 ; *Jacobs v. Putnam*, 4 Pick. 108 ; *Carter v. Gregory*, 8 Pick. 165 ; *Allen v. Duncan*, 11 Pick. 308.

I. C. Bates and C. A. Dewey, for the defendants, as to the first objection, cited *Rice v. Bancroft*, 11 Pick. 469 ; *Boyden v. Moore*, 11 Pick. 362 ; *Allen v. Duncan*, 11 Pick. 308 , and as to the second, *Clement v. Durgin*, 5 Greenl. 9.

SHAW C. J. afterwards drew up the opinion of the Court. There being no evidence of a hiring by the defendant Graves, we think it was competent for him, in an action charging him as a wrong-doer, jointly with the defendant Clapp, to explain his apparent connexion with the latter, by proving that he was a passenger only. Besides, in the event, this fact became immaterial, there being a verdict in favor of both defendants.

The Court are also of opinion, that the deposition was rightly admitted. By the Rule of Court, (old Rules, 11, in Metcalf's Dig. 306 ; new Rules, 6,) where a deposition is taken under a commission directed to any justice, &c. the certificate of execution on the return of such commission, by a person professing to act as such magistrate, shall be *primâ facie* evidence of his official character, and the burden of proof shall lie on the party objecting. The argument in support of the objection in the present case is, that this rule applies only to cases where the commission is addressed to some particular justice of the peace or other officer by name. This we think is not a sound construction of the rule. Where the commission is directed to a person by name, it is immaterial whether he has any official character or not ; he would have sufficient authority to take the deposition from the commission itself. Such it is believed has been the practice under these rules, both here and in Maine. *Clement v. Durgin*, 5 Greenl. 9.

Exceptions overruled, and judgment of the Court of Common Pleas affirmed

EDWIN R. YALE *versus* The HAMPDEN AND BERKSHIRE TURNPIKE CORPORATION.

Under *St.* 1804, c. 125, § 6, [Revised Stat. c. 39, § 42,] a turnpike corporation is liable for damage sustained by a traveller in consequence of a defect in the road, although the defect was a latent one, and the corporation used due diligence to discover defects, and keep the road in repair.

THIS was an action on the *case* under the *St.* 1804, c. 125, § 6, providing that a turnpike corporation "shall be liable to pay all damages which may happen to any person from whom toll is demandable, for any damages which shall arise from defect of bridges, or want of repair of said turnpike road."

At the trial, before *Wilde J.*, it appeared, that on the 25th of December, 1834, while the horses and wagon of the plaintiff were passing over the road of the defendants, one of the horses fell, and it was found that his foot was in a hole in the road, from which it was extricated with difficulty; and that this accident occasioned some expense to the plaintiff, the horse having been rendered lame thereby.

The defendants offered to prove, that the road was originally well constructed and had been constantly kept in good repair; that they employed an agent, who had constant supervision over that part of the road where the accident happened; that a person employed by him to watch the state of the road, had passed over it a few minutes before the accident happened, and discovered no defect therein; that there had been a heavy rain a short time before, and during the night immediately preceding the day on which the accident happened, the ground had been frozen hard; that the horse's foot must have broken through the frozen surface and formed the hole; that the defect was occasioned by the action of the elements; and that the accident happened to the plaintiff without the fault or neglect of the defendants.

This evidence was rejected, and it was ruled, that if the plaintiff was passing over the road and was liable to pay toll, and the injury happened in consequence of a defect in the road, the defendants were liable, although there was no negligence on their part.

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and
Berkshire
Turnp. Corp.

The defendants excepted

The case was argued in writing.

Knox, Chapman and Ashmun, for the defendants. A turnpike corporation is not liable except for damages happening through *its fault or neglect*. The words of the statute are, "damages which shall arise from defect of bridges or want of repair of said turnpike road." This does not mean damages arising from a *defect* of the road, unless that defect is occasioned by *want of repair*. The legislature has applied the term, *defect*, to bridges, and the term, *want of repair*, to roads; and therefore does not use them as convertible terms. The statute then does not sustain the ruling of the judge. But what is meant by *want of repair*? If the defendants are bound by the statute to keep their road at all times free from defects of every kind, so that it shall be always perfectly safe for travellers, the statute requires what is absolutely impossible. The term "want of repair" is not applicable to defects of the nature of the one in question; for they cannot be repaired, till a change of the season makes the repairs. The corporation cannot prevent their existence. The meaning of the phrase "want of repair," may be inferred from the fact, that the same section of the statute makes the corporation liable to *indictment* for not keeping the road in repair. They are liable for damages only when liable to indictment. But it cannot be pretended, that they are liable to indictment unless when guilty of neglect.

W. G. Bates and Leonard, for the plaintiff, cited Buller's N. P. 73; *Randall v. Cheshire Turnp. Corp.* 6 New Hamp. R. 147; *Smith v. Smith*, 2 Pick. 621; *Leame v. Bray*, 3 East, 593; *Williams v. Hingham & Quincy Turnp. Corp.* 4 Pick. 341.

SHAW C. J. drew up the opinion of the Court. It appears by the report, that the plaintiff's horse, whilst travelling on the defendants' turnpike road, the plaintiff having paid toll or being liable to pay toll, broke through a defective place in the surface of the road, and thereby sustained some damage. The defendants offered to prove, that the road was originally well and thoroughly made, and that they used all due diligence to discover defects and keep the road in repair; from which it would result, that the defect was a latent one, not discoverable by

care and diligent superintendence. The evidence of these facts was rejected, on the ground, that if proved, they would not amount to a legal defence ; and the question for the Court is, whether these facts, if proved, would show a good defence

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It is proper, in the outset, to distinguish between the legal liability of turnpike corporations and that of towns. The language, as well as the policy, of the law differs essentially in the two cases. The provision of the general turnpike act, 8th Geo. 4, c. 125, § 6, is this ; “ and the said corporation shall be liable to pay all damages which may happen to any person from whom toll is demandable, for any damages which shall arise from defect of bridges or want of repair of said turnpike road.” The Court are of opinion, that by this act it was intended to provide, that whenever the traveller himself is not chargeable with negligence or rashness, but where from an unforeseen cause the road is actually defective and in want of repair, and an accident occurs without the default of either party, the company should be held liable. It is founded on the consideration, that the toll is an adequate compensation for the risk assumed, and that by throwing the risk upon those who have the best means of taking precautions against it, the public will have the greatest security against actual damage and loss. This is also the most literal and natural construction of the words of the statute. It makes the company liable to all those from whom toll is demandable, for the damages arising from the defect of bridges and want of repair of the turnpike road, without regard to the cause of such unsafe condition. This construction of the statute is not likely to expose turnpike corporations to any extraordinary burden, because if there be a bridge broken down or a chasm made by floods, or other open and visible obstruction, and the traveller through his own negligence or rashness should fall in and suffer damage, such damage would be attributable to himself, and could not be said to arise from want of repair in the road.

Exceptions overruled, and judgment on the verdict for the plaintiff

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF WORCESTER, OCTOBER TERM 1836,
AT WORCESTER.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } **JUSTICES.**
HON. MARCUS MORTON,

EMORY SCOTT *versus* JOSEPH RAY *et al.* and
Trustees.

One summoned under the trustee process, disclosed in his answers, that the principal defendant made a general assignment of his property to the respondent in trust to pay creditors who should become parties to the assignment, and that the assignment was executed by the defendant, the respondent, and a few preferred creditors ; that afterwards these creditors, together with some others, including the plaintiff, who had attached the property in the respondent's hands, gave the defendant a letter of license, containing a stipulation that the creditors would accept the principal of their demands in full satisfaction, on condition that it should be paid in ten equal semi-annual instalments, and a further stipulation, that the creditors who had attached the property in the respondent's hands should be at liberty to continue their actions in court until default should be made in the payment of the instalments ; that it was then expected and represented by the defendant, that by having the use of certain machinery and tools embraced in the assignment, he would be able to pay all his creditors ; that under this expectation the respondent permitted the defendant to possess and use such machinery and tools, not however relinquishing the respondent's right to sell the same, should it become necessary ; that the defendant, after paying half of the instalments, became unable to pay the rest,

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and thereupon the respondent proceeded to sell the property for the payment of the debts ; that none of the creditors, prior to the failure to pay the instalments, had requested the respondent to hasten the sale, and he believed that they acquiesced in the postponement of it ; and that he sold some of the property to one W. on a credit, taking therefor his negotiable note, payable to a bank and signed by the respondent himself as surety and discounted by the bank. It was *held*, that the respondent should account for the price of the property sold to W., the note taken being *prima facie* a payment, and this presumption not being rebutted by the fact that the note was signed by the respondent as surety.

Held also, that under the circumstances above stated, the permission given to the defendant to possess and use the machinery and tools, was not sufficient to prove the assignment fraudulent and void.

Held also, that the respondent was not to be charged with rent, hire or use of the machinery and tools, it being no part of the trust that he should let or use the same for profit, and he having received nothing by way of rent or use, and there being, by reason of the license, to which the plaintiff was a party, no negligence on the part of the respondent, in delaying to sell the property.

Held also, that in stating the demands which were to be allowed as a charge on the funds, the respondent should be permitted to cast interest on his own demand and those of other creditors, parties to the assignment, up to the time of selling the property and realizing the proceeds.

The respondent having a demand due to him personally, and another due to him as assignee, against the same person, and having obtained satisfaction of the first demand, it was *held*, that he should apply the satisfaction received, to both demands, *pari passu*, it being his duty to take as good care of the trust property as of his own.

The respondent having answered that he had funds in his hands, and that he had paid a co-assignee a certain sum for his services, and that he thought this sum had not been repaid him by the defendant, he was *held* to be chargeable for such sum, the burden being upon him to show that it had not been refunded.

CALEB COLVIN, one of the supposed trustees, states in an original and a supplementary answer, among other things, that on the 25th of July, 1829, Paine & Ray, the principal defendants, by an indenture, (which is made a part of the answers,) conveyed to the respondent and to Caleb Cook, two factories, a store, certain machinery, tools, and other personal property, in trust to pay the creditors of Paine & Ray, who should become parties to the assignment ; that at the time of the service of this trustee process, the assignment was executed by Paine, Ray, Cook, the respondent, (who was a preferred creditor, as well as an assignee,) and two other preferred creditors ; that the proceeds of the property assigned, (as stated in an account of sales,) with interest to January 1, 1835, amounted to \$6,874.04 ; and that the notes paid, or to be paid, out of the same proceeds, with interest to the same day, viz. (among others) two notes to the Mendon bank for \$1,200 and

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\$ 750, made by Paine & Ray, as principals, and the respondent, as surety, and two notes made by Paine & Ray to the respondent for \$ 1,300 and \$ 600, together with the expenses of executing the assignment, (as stated in an account,) amounted to \$ 8,163·71, (three items being for the expense of finishing a double speeder, according to directions in the assignment, \$ 365·69, amount paid C. Cook for services as assignee, \$ 34·37, and expenses and services of the respondent, as assignee, \$ 398·87 ;) that the proceeds of the sales had come into the respondent's hands, or been secured to him, except the price of ten looms, &c. sold to Abel Wilder for \$ 600, on December 10th, 1833, on a credit of six months ; that Wilder was solvent at the time of the sale and became insolvent within the six months, and has not paid the above sum, and it is not carried into the footing of the account of sales ; that the respondent and his partner sued Wilder in March, 1834, and recovered judgment for \$ 3,010·35 debt, and at the same time the respondent alone brought an action against him for the money due on his note for \$ 600, and another note, for \$ 42·97, made by him to the respondent in the respondent's private capacity, and recovered judgment for \$ 663·47 debt ; that the same property of Wilder was attached in each action, the first attachment being in the first named action and the property being enough to satisfy the judgment in that action, and \$ 48·43 on the other judgment, exclusive of officer's fees ; and that the respondent delivered the two original writs to the officer at the same time, and directed him to secure the demands, without giving directions which writ should be served first ; that by an arrangement between the respondent and Cook, the trusts of the assignment have been principally executed by the respondent, and he has paid Cook for his services, as mentioned in the account, and he thinks the amount so paid has not been repaid him by Paine & Ray, but he is not positive of that fact ; that he has caused all the notes mentioned in the account, to be paid, excepting the two notes for \$ 1,200 and \$ 750 made to the Mendon bank, and the two notes for \$ 1,300 and \$ 600, made by Paine & Ray to the respondent ; that he has caused a part of the notes to the bank to be paid, and has undertaken to pay the residue as soon as he shall have collected the proceeds of

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the sales above mentioned ; that the tools in the machine shop have been in use about all the time since they were assigned, and the machinery all the time except about a year, until they were sold ; that they had not been leased by the respondent, but Paine & Ray used them or leased them until they were sold ; that the respondent and his partner hired the store, of Paine & Ray, after the assignment ; that in the autumn of 1829, Paine & Ray made an arrangement with most of their creditors, by which they obtained a letter of license, (which was made a part of the answers,) for five years and two months, on condition that Paine & Ray should pay ten per cent on the principal sums due from them, once in six months, and upon such payment of the principal sums the creditors were to give a discharge of their claims ; and there was a further stipulation, that those creditors who had obtained any security by attachments should not be bound to relinquish them, but should be at liberty to continue their actions in court until default should be made in the payment of the semi-annual instalments ; that to this arrangement the plaintiff and other creditors who had cited the respondent as trustee of Paine & Ray, and some of the creditors mentioned in the deed of assignment, became parties ; that it was then expected and represented by Paine & Ray, that by running their machinery and carrying on their business as they had done before their failure, they would be able to pay off all their creditors ; that under this expectation the respondent permitted them to run the machinery, not relinquishing his right to sell it if it should be necessary, and that he never received any rent for the use of the machinery or tools, and it was not understood, either by them or the respondent, that they were to pay for such use ; that they paid most of the creditors who became parties to the letter of license, fifty per cent, and some of them sixty per cent, according to the conditions of the letter of license, and in the autumn of 1833, they became unable to pay the residue of the instalments, after which the respondent proceeded to sell the assigned property, from time to time, as opportunity occurred ; that no one of the creditors who have actions pending, or of those who were parties to the assignment, requested the respondent to hasten the sale of the property, prior to the failure of Paine & Ray to pay the instal-

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ments, and he then believed, and now believes, that they acquiesced in the postponement of the sale ; that the respondent's impression was, that he charged Paine & Ray \$ 100 for his services, and that this sum was included in a settlement with them in 1832, but whether any part of that charge was for services and expenses as assignee, he does not recollect, that the expense of finishing the double speeder, as stated in the account, amounting to \$ 365.99, was, without the interest, \$ 338.26, of which Paine & Ray paid \$ 257.77, the residue being paid out of the proceeds of the assigned property, viz. \$ 36.60 out of the proceeds of a turning engine, credited in the account of sales, and \$ 43.89 out of the proceeds of some iron, &c. sold and not accounted for in the account of sales ; that the notes to the Mendon bank were presented to the commissioners of insolvency on the estate of Paine, who has deceased, and a dividend of about eight cents on the dollar has been decreed on the notes, which has not yet been paid nor demanded, and that a dividend has been allowed by the commissioners, and decreed, on the two notes made to the respondent.

Oct. 5th,
1835.

S. Allen, for the plaintiff.

W. S. Hastings, for the trustee.

Oct. 10th,
1836.

SHAW C. J. delivered the opinion of the Court. From the very voluminous examination of Colvin, the trustee, and the extensive detail of facts and particulars disclosed in his answer, it is difficult to come to a satisfactory result ; and it would be indeed quite impossible to settle the account of the trustee and state a balance, without a more careful examination of the facts, and a more exact computation of the interest and other particulars of the account. But this we think is not necessary for the purposes of the present inquiry, the object being only to ascertain whether the trustee is liable for any thing, and not to state the balance and determine the precise sum for which he is liable.

The general facts disclosed in the answer are, that Paine & Ray, the principal defendants, in July 1829, made an assignment of certain machinery and other property to Caleb Colvin, the trustee who answers, and to Caleb Cook, which assignment is referred to and made the basis of the answer

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By the terms of the assignment, the assignees were to be responsible for the sums by them respectively received, and not each for the other; and as it appears by the answer of Colvin, that he was the sole acting assignee, and has received all the money that has been received as the proceeds of the trust property, it may be considered as if the assignment had been to him alone, for all the purposes of this inquiry.

It appears, that the assignment was executed by none but certain preferred creditors particularly named. It further appears, by the explanatory answer of the trustee, to which there is no objection, that after the execution of the assignment, and after the service of the trustee process in this case, which was made in 1829, many of the creditors of Paine and Ray, among whom was the plaintiff, entered into an agreement of composition, accompanied with a letter of license, by which they stipulated to give the debtors a license for five years and two months, on condition to pay the original amount of their debts, without interest or costs, in ten semi-annual instalments of ten per cent each, and on such payment said creditors to receipt the same in full satisfaction and discharge of their claims. But it was further stipulated, that those of said creditors who had obtained any security by attachments, should not be bound to relinquish them, but should be at liberty to continue their actions in court, without prosecution, until default should be made in the semi-annual instalments stipulated to be paid. This letter of license and deed of composition is submitted and made part of the answer. It appears, that the instalments were paid for some time, and to the amount of fifty per cent of the debts, and then the debtors became unable to pay, one of them having died. Pursuant to the stipulation in this agreement, this action was continued in court, from time to time, till 1834 or 1835, when the trustee was called upon to answer, and the further proceedings have been had. The trustee states, that until the failure to pay the instalments, he was not called upon by any person interested, to sell the trust property, or to take any steps to carry the purposes of the assignment into effect.

The trustee has now submitted his answer, upon which several questions arise for the consideration of the Court and have been fully argued.

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The Court are of opinion, that in stating the account of unds with which the trustee ought to be charged, the value of the machinery sold to Wilder ought to be included, on several grounds. It does not distinctly appear, that the trustees were authorized to sell on credit; but further, the note given by Wilder, made payable to the bank and discounted there, was *prima facie* evidence of a payment, and the fact that Colvin, the trustee, became surety upon the note, does not rebut this presumption. Again, a trustee is bound to take as good care, at least, of the trust property as of his own, and, therefore, when the trustee, having demands of his own and those of his trust, at the same time, against Wilder, obtained satisfaction in part, then as between him and the parties interested in the trust fund, he ought to consider them satisfied *pari passu*, and this would render him liable for about five sixths of the debt. But for the reason first above given, that the note was a payment, we think he must be chargeable with the whole amount, with interest from the time of the sale.

The Court are also of opinion, that there is not enough on the trustee's answers, to warrant the Court in declaring the assignment fraudulent and void, especially as the possession and interference of the assignors, from which, in great part, such an inference must be drawn, if drawn at all, are accounted for by the letter of license, and the implied permission arising from it, to which the plaintiff assented, that such permission and interference should be allowed, and were intended to be authorized.

On the next point, we think there are no sufficient facts appearing in the answers of Colvin, to warrant the Court in finding, that the notes claimed by him to be paid out of the trust fund were without consideration or fraudulent, or otherwise void.

The Court are further of opinion, that in stating this account for the purpose of determining whether the trustees are chargeable or not, they are not to be charged with the rent, hire or use of the machinery, or other trust property, because 1. it was no part of the trust to let out or use the property for profit, and they state explicitly, that they received nothing by way of rent or use of it; and 2. they are not liable on the

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ground of delay and negligence in selling the trust property and converting the same into money and paying the debts, because by the letter of license, to which the plaintiff was a party, made soon after the attachment, and with manifest reference to the trustee attachments then pending, it was stipulated by the plaintiff, that he would not proceed in his attachment, for the term of five years, unless default should be made in the payment of the semi-annual instalments, then stipulated to be made, by which, if made agreeably to such stipulation, the debts would be fully paid and the attachments discharged. This was an express agreement on the part of the plaintiff, to allow delay and forbearance in his attachment, and by necessary implication, to allow a reasonable forbearance to the trustees, in settling and closing the trust, and permitting to the assignors the qualified use of the property as a means of continuing their business.

In stating the demands which are to be allowed as a charge on the funds, the trustees are to be permitted to charge interest on their own and the other creditors' demands, up to the time of the sale of the property and realizing the proceeds, for the reasons mentioned under the last head, viz. that the plaintiff and the other attaching creditors, by the extraordinary course of stipulating to continue their actions in court, and not proceeding upon their attachments, for such a length of time, and contingently, upon payment of certain instalments therein specified, to give up and relinquish them altogether, must be presumed to have intended to allow a much greater latitude of indulgence to the trustees in the management and application of the funds, than would have been allowable, had they proceeded promptly in the due course of law; and under the circumstances the rule adopted is an equitable one.

The trustee having admitted certain funds in his hands liable to the attachment, is responsible if he do not fully and clearly discharge himself, and in this respect the burden of proof is on him. In pursuance of this principle, the charge of \$365.69, the expense of finishing a double speeder, is to be stricken out, unless, upon a more accurate examination of the answer, it turns out that a part of it is to be allowed, as warranted by the assignment.

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So the trustee having admitted that \$ 100 towards expenses, &c. were paid by the principals, Paine & Ray, that sum is to be deducted from the charge of expenses.

On the same grounds, the sum of \$ 34·37, paid to Cook for services, is to be deducted, the trustee leaving it at least uncertain whether he had paid it.

We are also of opinion, that the sums received by the trustee, by way of dividend, from the estate of Paine, towards his own debt and towards the debts chargeable on the trust fund in his hands, are to be deducted, because they obviously diminish the amount thus chargeable on the fund, and leave a larger amount for which he is chargeable upon the trustee attachment.

These charges and deductions show a balance in the hands of the trustee, for which he is liable in this action, and therefore we are of opinion that the trustee must be charged.

For the reasons already stated, we have not thought it necessary to attempt ascertaining the amount for which the trustee may be chargeable ; and any opinion which we might express upon that subject, in this stage, would be premature.

It will no doubt be necessary that an account be stated upon the principles here expressed, that there should be a more rigid scrutiny of the facts, and a more exact computation of interest. This may be probably done by an auditor, if the parties shall so agree, either in the present stage of the cause or upon a *scire facias*.

Trustee charged on his answers.

**SYLVESTER CAHILL *versus* MARY BIGELOW and
Trustee.**

The defendant having contracted to board the respondent's laborers at his expense, it was verbally agreed between the defendant, the respondent and a third person, that the latter should deliver and charge provisions to the defendant, and the respondent would see him paid therefor. *Held*, that this promise of the respondent was within the statute of frauds.

Where one summoned as trustee made answer, that a debt was due from him to the defendant, but that he had verbally promised and he considered himself bound to pay a debt to a greater amount due from the defendant to a third person, it was *held*, that he was not obliged to set up the statute of frauds to avoid this promise, and that if he chose not to avail himself of it, he was not chargeable as trustee.

THE answer of Windsor Hatch, the alleged trustee, set forth, that the principal defendant had kept a boarding-house for the workmen employed in the respondent's manufactory, and that he became debtor for their board ; that at the time when the defendant began to keep the boarding-house, it was agreed verbally between the respondent, the defendant, and several persons named, who subsequently furnished her with provisions and other supplies, that the supplies should be delivered and charged to her, and that, at the end of each quarter, the respondent would see that the persons who furnished them were paid ; that the supplies were accordingly charged to the defendant, and the respondent paid all such charges up to January 1st, 1835 ; that at the time of the service of the writ, the amount due on account of supplies furnished upon the strength of the respondent's guaranty, exceeded the amount due to the defendant for board ; that the balance had never been less since that time, as she very soon afterwards left the boarding-house, and had not paid any part of the bills ; that if the respondent was legally liable for those charges which remained unpaid, in consequence of such verbal arrangement, then he had no goods, effects or credits of the defendant in his hands and possession at the time of the service of the writ ; that otherwise there was a balance due to her at that time ; that the respondent had always been in the habit of making such arrangements respecting the boarding of his workmen ; and that he considered himself bound to pay such charges, as those who furnished supplies for

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the boarding-house, would not have done it, if it had not been for his engagement to see them paid.

Burnside, for the plaintiff, to the point, that the undertaking of the defendant was collateral, and within the statute of frauds, cited *Leonard v. Vredenburg*, 8 Johns. R. 29 ; *Tileston v. Nettleton*, 6 Pick. 509 ; *Matson v. Wharam*, 2 T. R. 80 ; *Jones v. Cooper*, Cowp. 227 ; *Anderson v. Hayman*, 1 H Bl. 120.

Washburn, contra. If the undertaking of the respondent is within the statute of frauds, he has a right to avail himself of that statute or not, as he chooses, it being a personal privilege ; and the plaintiff, who is a stranger, cannot interpose and oblige him to set up the statute in avoidance of his contract. *Boardman v. Roe*, 13 Mass. R. 104 ; *Mills v. Wyman*, 3 Pick. 207.

But the undertaking of the respondent was not within the statute of frauds. *Perley v. Spring*, 12 Mass. R. 297 ; *Swan v. Nesmith*, 7 Pick. 223 ; *Towne v. Grover*, 9 Pick. 506 ; *Chitty on Contr.* 203.

Oct. 10th,
1836.

SHAW J. C. delivered the opinion of the Court. The only question is, whether the trustee is chargeable on his answer, as having goods, effects or credits of Mrs. Bigelow, the principal defendant, at the time of the service of the writ. On the facts disclosed in the answer, the attaching creditor contends, that the trustee is chargeable, on the ground, that he was indebted to the principal for the board of his workmen, and that his undertaking to pay those who supplied her, was void by the statute of frauds, because it was a promise to pay the debt of another, without any note or memorandum in writing. On the contrary, the trustee insists, that he is entitled to be discharged, first, because his undertaking to pay those who furnished supplies to Mrs. Bigelow, was original and not collateral, and so not within the statute of frauds ; and secondly, because, if otherwise, the trustee is not bound to set up the statute of frauds to avoid his engagements, his contract was voidable and not void, and if he does not elect to avoid it, he is not bound to do so, to aid an attaching creditor.

On the first point the Court are all of opinion, that the undertaking of Hatch, the trustee, to pay for supplies furnished

to Mrs. Bigelow, was collateral and conditional, to pay if she did not, to pay her debt, and so was within the statute of frauds. Had any one of these persons brought an action against Hatch, and he had chosen to rely on the statute of frauds, it would have been a good defence, there being no note or memorandum in writing. We consider this point well settled by authorities. The test is this, when the promise is made before the credit is given, to decide whether one promising is an original debtor or a guarantor, namely, whether credit was given to the person receiving the goods. If it was, then such promisor is a guarantor only, undertaking to pay another's debt; if no credit was given to the person receiving the goods, then the promisor is himself debtor for goods sold to him and delivered to another person, by his order, his promise is not to pay the debt of another, and a parol promise, being made upon a good consideration, is a good contract at common law and binds him, and is not within the statute of frauds. *Matson v. Wharam*, 2 T. R. 80; *Jones v. Cooper*, Cowp. 227; *Anderson v. Hayman*, 1 H. Bl. 120.

We are aware, that a contrary opinion appears to be expressed in one case in this Commonwealth. *Perley v. Spring*, 12 Mass. R. 297. It is believed, that the opinion there expressed by the Chief Justice, in delivering the opinion of the Court, was not necessary to the decision of that case. With great deference to the generally accurate opinions of that distinguished jurist, we think it probable, that this opinion was drawn up in haste and without reference to the authorities. This appears obvious from the suggestion contained in it, that the uniform construction given by the English courts to that branch of the statute, has been, to consider the provision as applicable only to the pre-existing debts of a third person. The case apparently overlooks the distinction between a good consideration for a promise, at common law, and the evidence required by statute to prove such promise, when it is to pay the debt of another. *Rann v. Hughes*, 7 T. R. 350, note. But we think that the case of *Perley v. Spring*, was substantially overruled by a subsequent case, in which, apparently, the same eminent judge concurred. *Tileston v. Nettleton*, 6 Pick. 509.

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In the present case, it appears perfectly clear upon the trustee's answer, that the supplies were in the first instance charged to Mrs. Bigelow, that she was debtor for them, and that the promise of Hatch was to see the creditors paid, in other words, to pay her debt.

Upon the other point, the Court are of opinion, that the guarantor by parol was not bound, against his own choice, to set up the statute of frauds, to avoid his promise to pay for the supplies furnished to Mrs. Bigelow. The contract entered into by him with these persons, was a lawful one, made on sufficient consideration, and would be good at common law. But the statute, on considerations of policy, intervenes and declares, that such a contract shall not be enforced by action, unless the agreement or some memorandum thereof shall be in writing. *St. 1789, c. 16, § 1.*

But the statute is intended as a shield, and is to be used for the protection of those, who would be in danger of suffering injury from false testimony by setting up pretended parol promises of guaranty. The statute does not declare the contract void, but merely provides, that no action shall be brought whereby to charge, &c. unless the contract, or some memorandum thereof, be in writing. The effect of the statute is, that the promisor, who would otherwise be liable to such an action, may avoid it.

The guaranty having been given by the request of the debtor, and for her benefit, whatever should be paid upon it by the guarantor must be deemed to be paid at her request, and for her account, and would be chargeable to her, and must go to discharge the debt due from him to her. The trustee in effect declares his election, not to avail himself of the statute of frauds to avoid his parol undertaking to pay these debts, but to pay them according to the original understanding between him and the other parties ; and the Court are of opinion, that he has a right to do so and to charge the payments in his account with Mrs. Bigelow ; in which case there is nothing remaining in his hands due to her, liable to the attachment. See *Alexander v. Vane*, 1 Mees. & Welsby, 511.

Trustee discharged.

SAMUEL SLATER *versus* JOHN DUDLEY.

A father conveyed his life estate in certain land to his son, on condition, that whereas the son had agreed to support the father during his life, and the father was desirous of remaining in possession for the purpose of securing such support, the deed should be void if the son should fail to furnish such support, or should disturb the father in the peaceable possession of the land. It was *held*, that such deed was not *per se* fraudulent as against creditors of the father, but was open to explanation; and that the stipulation as to the support of the father and his remaining in possession, was a condition, and not a reservation defeating the grant.

WRIT of entry. Trial before *Putnam J.*

The demandant, on the 21st of November, 1831, attached the demanded premises as the property of Paul Dudley, and afterwards duly extended his execution thereon.

The tenant claimed under a deed from Paul Dudley.

On the 22d of October, 1831, Benjamin Dudley, by a codicil to his last will, devised "to Paul Dudley and his wife Dorothy, an undivided two thirds part of the use and improvement" of the demanded premises; "to have and to hold, to use and improve the same, to each of them, during their natural lives, and to the longest liver of them. It is to be understood the said use and improvement of the said two thirds is to be and remain for the sole support of the said Paul and Dorothy and for no other."

On the 23d of October, 1831, Paul Dudley, who was the father of the tenant, executed a deed, setting forth, that in consideration of the sum of \$1000 paid him by the tenant, he thereby granted and quitclaimed all his right and title in the demanded premises, to the tenant, his heirs and assigns; and that the deed was "on condition, that whereas the said John Dudley has covenanted and agreed to furnish the said Paul Dudley and his wife, Dorothy, bed, board, clothing and physic, and in all respects support and provide for the said Paul and Dorothy a good and comfortable living, both in sickness and health, for and during each of their, the said Paul and Dorothy's, natural lives, and the longest liver of them, and whereas the said Paul and Dorothy are desirous of remaining in possession of said described premises, for the purpose of securing said support, now therefore, if the said John Dudley shall fail

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in any respect faithfully to furnish good and sufficient support, as aforesaid, in sickness and in health, or shall, at any time during the natural lives of the said Paul and Dorothy, disturb them in the peaceable possession of the aforesaid described premises, then this deed is to be void, otherwise to remain in full force and virtue in the law." This deed was delivered on the 24th of October, 1831, in the evening after the death of Benjamin Dudley, and was recorded on the next day. The whole consideration was an agreement, testified to have been made at the time, by which it was stipulated, that the tenant should give up to the grantor, securities held against him amounting to the sum of \$ 1000. These securities were not specified, and were not given up until the 22d of January, 1832, when several negotiable notes, amounting to the sum of \$ 1176, were delivered up to the grantor by the tenant, and a new note taken for the excess over the sum of \$ 1000.

The demandant contended, that under the circumstances of the case, the intervention of his attachment between the execution of the deed and the actual payment of the consideration, defeated the conveyance to the tenant.

The demandant further contended, that the deed was void, that as a life estate was granted and a life estate taken back, the deed was destructive of itself; that even if it might have any validity between the parties thereto, it was, upon its face, void against a *bonâ fide* creditor of the grantor, as fraudulent or conclusive evidence of fraud in law; and that it was made with intent to defraud creditors. But the jury were directed to consider the contents of the deed, and particularly the condition annexed to it, in connexion with the other evidence of fraud.

The jury returned a verdict for the tenant.

If the Court should determine, that the deed was void or inoperative, the verdict was to be set aside, and the tenant defaulted; unless they should be of opinion, that no estate passed to Paul Dudley by the codicil, which could be extended upon by his creditors; in which case, the verdict was not to be disturbed.

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C Allen and Bacon, for the demandant, to the point, that the deed of Paul Dudley was, upon its face, fraudulent as against his creditors, and void, the object of the deed being

to convey the legal estate to the grantee, while the whole beneficial interest was reserved to the grantor, cited *Northampton Bank v. Whiting*, 12 Mass. R. 110 ; *Hills v. Eliot*, 12 Mass. R. 26 ; 2 Cruise's Dig. tit. 13, c. 1 ; and to the point, that it was directly contrary to *St. 27 Eliz. c. 4, § 5*, Rob. Fraud. Conv. 12.

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Barton, for the tenant, contended, that the deed vested the legal estate in the grantee, reserving to the grantor only a license to remain in possession, or that it might be considered as raising a valid trust for the grantor ; and cited *Newhall v. Wheeler*, 7 Mass. R. 189 ; *Cadogan v. Kennett*, 2 Cowp. 432 ; *Doe v. Routledge*, 2 Cowp. 705.

WILDE J. delivered the opinion of the Court. The tenant claims under a deed from Paul Dudley, the former owner of the demanded premises ; but the demandant objects that this deed is fraudulent on the face of it, and that on this ground the verdict ought to be set aside. It is true, that the stipulation of the tenant, or the condition in the deed, for the support and maintenance of the grantor and his wife, was *prima facie* evidence of fraud ; but it was open to explanation, and was explained to the satisfaction of the jury. The evidence is not reported, but it is understood that the full value of the estate was paid, and if so, the agreement to support the grantor and his wife, although it might appear to be a suspicious circumstance, was gratuitous, but not conclusive evidence of fraud. The whole evidence was submitted to the jury, and we cannot say that they have done wrong by establishing the deed. The circumstance, that the notes were not given up at the time the deed was executed, nor until after the attachment, is but a slight circumstance ; for the tenant agreed to give them up, and that agreement was binding.

Oct. 10th

It was also contended, that upon a fair construction of the deed, the stipulation as to the board and maintenance of the grantor and his wife, amounts to a reservation ; but we think, that neither the words of the deed, nor the general rules by which all conveyances are to be construed, will admit such a construction. For a life estate only passed by the grant, and if by the reservation a life estate were taken back, the reservation would be repugnant to the grant and void. The stipulation

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in question was, therefore, clearly a condition, and the condition does not appear to have been broken ; so that the tenant's title remains unimpaired, and the question as to the supposed trust under the codicil of Benjamin Dudley becomes immaterial.

Judgment on the verdict.

MAYNARD KING *versus* LYMAN MOORE.

An assignment by an insolvent debtor, of a part of his property, in trust for the benefit of his creditors, provided for the payment, first, of certain sureties, also creditors, including the plaintiff, who was one of the assignees, in full, if the property should be sufficient, otherwise *pro rata*, and then of such other creditors as should become parties to the assignment, in full or *pro rata* ; and the assignors covenanted to dispose of the property and pay over the proceeds in manner aforesaid, within one year, and the "creditors" becoming parties to the assignment, agreed, "upon being paid in manner aforesaid, to cancel and discharge their respective demands." It was *held*, that the execution of the indenture of assignment by the plaintiff, and his acceptance of the trust, operated as a full and immediate discharge and satisfaction of his claims both as surety and as creditor ; so that a subsequent conveyance to him by the debtor, of other property, as further security for those creditors was without consideration and invalid against a creditor not a party to the assignment.

REPLEVIN to recover a quantity of loom castings.

By an agreed statement of facts it appeared, that on February 26th, 1834, Samuel Flagg, of West Boylston, being in failing circumstances, assigned certain real and personal estate, including choses in action, to the plaintiff and Matthew Davenport "and to their assigns, in trust for the benefit of the creditors of the said Flagg, in manner following, viz. the said assignees to be first paid for their services and disbursements, and secondly, the following sureties to be first paid in full, provided the aforesaid property shall be sufficient, if not, then to be paid *pro rata*, viz. [enumerating such sureties, and including the plaintiff among them,] also creditors,—all the laborers or machinists in the factory, thirty-three per cent on their demands respectively,—and the first parish in West Boylston, and such other creditors as shall become parties hereunto as aforesaid, to be paid with the residue of said property, in full, should the same be sufficient, otherwise to be paid *pro rata*. And the said King and Davenport hereby agree to accept said appointment, and covenant with the said Flagg to sell and dispose of the property aforesaid, and

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pay over the proceeds in manner aforesaid, within one year ; and the creditors, whose names are hereunto affixed, hereby agree and covenant with the said Samuel Flagg and the said King and Davenport, to accept this assignment, and, upon being paid in manner aforesaid, to cancel and discharge their respective demands." The plaintiff became a party to the assignment.

It appeared, that Flagg was indebted to the plaintiff in the sum of \$ 70 ; that the plaintiff was also surety for him on a note held by the Quinsigamond bank at Worcester, on which the sum of \$ 750 was due.

On the day after the assignment was made by Flagg, the plaintiff caused a new note for the sum of \$ 750, payable to the Quinsigamond bank, to be made, which he carried to Worcester, and the bank being closed, he delivered it to Isaac Davis, Esq., who was a director and the solicitor of the bank, with a request that it might be received by the bank as a substitute for the note which had become due, and that a suit might not be commenced on that note. Mr. Davis, on the opening of the bank, delivered the new note to the cashier ; and it remained at the bank, until the amount due from Flagg and his sureties was paid in full by the plaintiff, which payment was subsequent to the bill of sale hereafter mentioned. The new note was not discounted ; and no vote was ever passed by the directors of the bank, in relation to it.

On February 28th, 1834, Flagg executed a bill of sale of the castings, in the common form, to the plaintiff, they not being included in the assignment. The castings were then on their way from Lowell to West Boylston, in the possession of a carrier ; and the plaintiff, on the same day, took possession of them by virtue of the bill of sale, and contracted with the carrier, to deliver them to him at West Boylston. Before their arrival at West Boylston they were attached by the defendant, who was a deputy sheriff, at the suit of George W. Bolton, a creditor of Flagg, but not a party to the assignment, and were held by the defendant by virtue of the attachment.

At the time when the bill of sale was executed, the plaintiff had been informed that Bolton was taking measures to attach the castings ; and being apprehensive that the property assigned might not be sufficient to secure himself and the other cred-

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itors, he obtained the bill of sale to prevent such attachment, and to secure the castings to himself.

The property embraced by the assignment, was afterwards reduced to money or the value thereof ascertained, and amounted to the sum of \$ 3,544. The preferred claims, including the two claims of the plaintiff, amounted to the sum of \$ 3,315, provided the first parish in West Boylston were entitled under the assignment to receive payment of their claim, amounting to the sum of \$ 820, in full.

Oct. 5th. *Merrick and Dustin*, for the defendant.

C. Allen and Davenport, for the plaintiff.

Oct. 10th. PUTNAM J. delivered the opinion of the Court. If the bill of sale of the 28th of February is established, the plaintiff should prevail ; otherwise not. The plaintiff contends, that at the time when he took this bill of sale, his claim against Flagg remained in force ; that it was not to be cancelled until it should be paid, and therefore that he had a right to take the bill of sale, and hold the property to his own use ; and that the new note which he caused to be delivered to the bank after the assignment, with intent to pay his liability for Flagg to the bank, gave him a right to take and hold the goods contained in the bill of sale.

The new note, we think, may be laid out of the case. It never was accepted or discounted by the bank ; and we cannot perceive, that it gave the plaintiff any new or greater rights against Flagg than he had before that negotiation was attempted.

And we all think, that by a true construction of the assignment, the plaintiff accepted the property in full discharge of his claims against Flagg, including his liability to the bank, and his own debt. The assignment is not very skilfully drawn, but its general intent is very clear. It was a full accord and satisfaction of all the demands which the creditors who became parties to it, had against Flagg, in consideration of the real and personal estate and choses in action which were particularly described and conveyed by Flagg to the creditors. One year was allowed to the trustees, to reduce the property to cash, and then they were to pay the creditors. The plaintiff himself is one of the trustees, holding funds more than sufficient to pay all the preferred creditors, among whom his name is to be found. It is not for him to say that this debt has not been

paid. No action could have been maintained by him against Flagg within the year. By accepting the particular property conveyed, in discharge of his claims, according to the assignment, we all think, that he had no legal right to interfere with the attachment which the defendant caused to be made upon the property of Flagg other than that which was conveyed by the assignment. It follows, that the bill of sale, being without any valuable consideration, was of no validity ; and that the defendant's attachment should be held valid.

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The opinion of the whole Court is, that there should be judgment for the defendant, and for a return of the goods which were replevied.

JOHN S. CHAPIN *versus* EMORY TAFT.

The plaintiff, in order to lay a foundation for the introduction of secondary evidence of the contents of a letter written by the defendant to a third person, filed his own affidavit setting forth, that such third person told him that the letter was lost. It was *resolved*, that the affidavit was insufficient for that purpose, as the loss could have been proved by competent evidence, and the affidavit was mere hearsay. See *Taunton Bank v. Richardson*, 5 Pick. 436 ; *Poignand v. Smith*, 8 Pick. 278 ; *Parkins v. Cobbet*, 1 Carr. & Payne, 282.

The Inhabitants of WORCESTER *versus* The Inhabitants of MILFORD.

Under *St. 1834, c. 150*, requiring the town in which a pauper lunatic resided at the time of his commitment to the State Lunatic Hospital, to pay the expense of supporting him while there, and giving to such town a remedy over against the town in which the lunatic has a legal settlement, notice of the expense incurred, given by the former town to the latter within three months after the hospital had demanded payment, was *held* to be reasonable notice to render the latter town liable to the former. [See Revised Stat. c. 48.]

But whether any notice was necessary, *quære*.

ASSUMPSIT for the recovery of \$ 97.27, paid by the plaintiffs to the trustees of the State Lunatic Hospital for the support of Russell Cheney, during his confinement in the hospital.

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Upon a case stated it appeared, that Cheney resided in Worcester on the 25th of January, 1834, when, upon application to the judge of probate, he was committed to the hospital, under St. 1833, c. 95, as a lunatic dangerous to be at large, and was there kept and restrained until the 1st of September, 1834, when he was discharged.

Cheney, while confined in the hospital, was a pauper standing in need of immediate relief. His legal settlement was in Milford. On the 1st of June, 1834, a part of the expenses of supporting him in the hospital, viz. \$ 52·68, and on the 4th of December, 1834, the residue, viz. \$ 44·59, were charged to the account of the town of Worcester, by the treasurer of the hospital ; who thereafter, on or before the 6th of the same December, demanded in writing, of the selectmen of the town, the payment of these expenses ; and on the 13th the selectmen paid the amount. On the 6th of December the selectmen of Worcester wrote a notice to the overseers of the poor of Milford, which was received on the 10th, stating that the treasurer of the State Lunatic Hospital had presented to such selectmen an account, in which the sum of \$ 97·27 was charged for the support of Russell Cheney ; and requesting such overseers, as his legal settlement was in Milford, to refund to Worcester that amount paid for the benefit of Milford. On the 30th of January, 1835, the overseers of Milford returned an answer, denying that the settlement of Cheney was in Milford, but adding, that if it should prove to be, they did not consider that town liable to pay the account, and that they declined paying the same.

If upon these facts the Court should be of opinion that the action was sustained, the defendants were to be defaulted, and the damages to be assessed by the Court ; otherwise the plaintiffs were to become nonsuit.

The cause was argued in writing.

Merrick, for the plaintiffs, referred to St. 1833, c. 95 : 1832, c. 163 ; 1834, c. 150 ; 1793, c. 59, § 9 ; 1797, c. 62 ; 1816, c. 28.

W. S. Hastings, for the defendants, cited some of the same statutes ; also *East Sudbury v. Sudbury*, 12 Pick. 1 ; *Boston v. Westford*, 12 Pick. 16 ; St. 1802, c. 22, § 2.

MORTON J. delivered the opinion of the Court. The pauper was committed to the State Lunatic Asylum by virtue of the statute of 1833, c. 95. He was there regularly detained from January 25th, 1834, to September 1st, 1834. The expenses of his support during this period were charged to the town of Worcester; and by the statute of 1834, c. 150, § 7, they were made liable to pay them, the pauper, at the time of his commitment, being a resident of that town. They accordingly paid the account, and now claim to recover the amount of the town of Milford, in which the pauper had his legal settlement. Whether they can legally establish this claim, is the question for our determination.

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The plaintiffs, not having given notice within three months after the expense for the relief and support of the pauper accrued, cannot recover under the general provision of the pauper laws, *St.* 1793, c. 59, § 9. Nor can they recover under *St.* 1832, c. 163. A part of the expenses was incurred under this statute, and by its provisions was chargeable only to the town where the pauper had a legal settlement. *St.* 1826, c. 142; *Wade v. Salem*, 7 Pick. 333; *Boston v. Westford*, 12 Pick. 16. The town of Worcester was not chargeable while this statute continued in force. But the statute of 1834, c. 150, repealed it and made them liable for the expenses which had accrued before, as well as those accruing after it passed. The town of Worcester could not have given notice within three months of the time when the relief for the first part of the time was furnished, because they were strangers to the transaction and had no interest in the matter. And as at the time of the commitment of the pauper no notice to the town of his residence was required, it does not appear, and there is no reason to suppose, that the officers of the plaintiff town had any knowledge of his commitment, or of their liability for his support, prior to the demand of the treasurer of the hospital. As soon as they were called upon, they notified the defendant town, but it was not in season to bring them within the statute of 1793. If this statute is to govern the case, the course of legislation on the subject must operate with great severity, if not injustice, upon the plaintiffs.

They rely upon the seventh section of *St.* 1834, c. 150.

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This section in the first place provides, that the town in which the pauper resided at the time of his commitment, shall be liable for his relief and support, and gives an action to the treasurer of the corporation, if the town does not pay the expenses incurred, within thirty days after a demand made. It then enacts, that "such town or city shall have the same rights and remedies against all corporations and persons, to recover such expense of supporting and removing any pauper lunatic, as if such expense had been incurred by said town or city, in the ordinary support of such lunatic." The most obvious meaning of this would seem to be, that the town thus liable to the hospital should have power to proceed in the same manner against the pauper's relatives, if he had any able to support him, and if not, against the town where he is legally settled, as if they furnished the relief and support by their own overseers. And yet this clause must necessarily, to some extent, modify the pauper laws. Should a remedy be sought by the town liable to the hospital for the support, could they bring their common law action, or would they be compelled to proceed by complaint, as in the third section is provided? Be this as it may, it is very clear that the Common Pleas could not fix the weekly allowance thereafter to be paid, for this must depend on the government of the hospital. Nor could they apportion the sum, the amount being uncertain, among the kindred. Nor could they determine with which of his kindred he should reside, nor that he should reside a part of the time with one and a part of the time with another or others.

So if the remedy was against the town in which the lunatic pauper was settled, it would be very clear that the limitation as to the price could not apply, because the town of the settlement would have no power to remove him. *St. 1821, c. 94, § 3.* And the plaintiffs' counsel strongly contends, that the provision requiring the notice within three months of the time of furnishing the relief, is superseded, because the reason and utility of it do not exist. The pauper could not be removed any more than if he was confined in the house of correction under sentence, and no measures could be adopted, to assume the payment of the expenses or to affect the amount of them or the treatment and management of the pauper. And as this

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clause was intended as a substitute for the fourth section of the statute of 1832, c. 163, it is assumed, that notice is dispensed with in the one statute as well as the other. This reasoning is not only plausible, but has great intrinsic force. And yet we entertain doubts whether it may be relied upon as conclusive. It would seem to us, that if the legislature intended to dispense with notice to towns, and give a certain remedy for the amount paid, without any previous notice or subsequent limitation, other than the general statute limitation, they would have used different and more simple and direct language; merely providing that the town reimbursing the hospital should recover the amount by them paid, of the town where the pauper had his settlement. It would, too, be a novel principle for a town to recover for the support of a pauper, without notice or request of payment. And yet many of the purposes of notice are taken away; the giving a seasonable notice is rendered difficult if not impossible; and if given, useless, or nearly so, to the town receiving it. Money paid by one town to another for the support of a pauper settled in a third, cannot be recovered of that town. *East Sudbury v. Sudbury*, 12 Pick. 1. So, but for the positive enactment of *St.* 1834, c. 150, § 7, Worcester could not recover for the money paid to the hospital, against the defendants. As that statute gives the remedy, so it must be entirely regulated by it. And our only object should be to ascertain the true meaning of the section in question, and how far it adopts and how far it modifies the statute of 1793. The latter statute, in requiring notice of the expenses of relief and support to be given, contemplates that the party giving the notice is the party who furnishes the supplies, and that no other person can give the notice or recover for the supplies. Now in this case, the plaintiff town did not furnish the supplies, nor had in any sense any control over them. Neither the hospital corporation nor its officers were the agents of the plaintiffs. They did not, therefore, within the meaning of the statute of 1793, "provide for the immediate comfort and relief" of the pauper. But they are made liable to pay for these supplies, and this by positive statute is made to stand in place of furnishing the supplies, and gives them the same remedy as if they had actually done so. As this is their first agency in the

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support, and perhaps their first knowledge of their liability, it would seem to be reasonable, and to approach as near the literal construction of the two statutes as is practicable, that the notice should have relation to the payment to the hospital, and that a notice at any time within three months after this payment would be sufficient, and an action might be brought at any time within two years from that act.

The notice must be given within three months after expenses *incurred*. When did the town of Worcester *incur* these expenses? Not before they paid, or undertook, or became liable to pay them. If the agent of the town furnishes the supplies, the town becomes immediately liable, it is in fact their act. If they contract with a person to do it, they are immediately responsible to him for it, and it is the same thing. In this case, although the statute provides, that the expenses shall be charged to the town of the pauper's residence, yet unless notice be given by the treasurer they cannot be said to be legally liable therefor, because such notice is an indispensable prerequisite to the bringing an action. And without it they never can be compelled to pay.

The notice in this case, was given to the defendant town within three months after demand made by the treasurer of the hospital upon the plaintiff town, and the payment of the account, and the Court are of opinion, that if any notice was necessary, this was seasonable and sufficient, according to the fair import of all the statutes taken together.

Defendants defaulted

ARTEMAS DRYDEN JUNIOR *versus* JOHN JEPHERSON.
JOHN JEPHERSON *versus* ARTEMAS DRYDEN JUNIOR.

D, the owner of a tract of land and two mill privileges, conveyed to M. a portion of the land, with a mill privilege, described in the deed by metes and bounds, "together with the privilege of a dam below D.'s factory and flowing the water as high as will answer and not injure or obstruct the water wheels of D. above." It was *held*, that this was a grant to M. of a right to build a dam for a mill privilege, and if, for the purpose of raising the water to the height agreed upon, it was necessary for M. to extend his dam over a part of the tract not included by such metes and bounds, he was authorized to do so, by the grant; that evidence of acts done by the parties under a mutual agreement, immediately after the grant was made, by way of marking out the site and height of the dam to be erected by M., was competent for the purpose of determining the extent of the grant; and that M. might maintain trespass *quare clausum* against D. for cutting through that portion of the dam which was placed upon the land not included by the metes and bounds, the interest of M. therein being a right of possession for the purpose of the dam, so long as his mill should continue, and not a mere easement.

THE first of these actions was trespass on the case, for flowing back water upon Dryden's mills by a dam, and for damage alleged to have been done to the lands of Dryden below the rolling dam, by the water flowing over the same. The writ was dated November 23d, 1835.

At the trial, before *Putnam J.*, it appeared, that on March 15th, 1825, Dryden, having become the owner of the whole of the estate now occupied by him and Jepherson, conveyed to Daniel Morse two acres and three quarters of an acre of the land, more or less, and the house and other buildings standing thereon, with a water privilege, the same being described in the deed by metes and bounds, "together with the privilege of a dam below said Dryden's factory and flowing the water as high as will answer and not injure or obstruct the water wheels of said Dryden's, above." There were other stipulations in the deed respecting the use of the water, limiting the grantee's right to the ordinary flow of the stream, exclusive of showers, freshets and thaws, and providing that, if the grantor should withhold or refuse to let the water down, the grantee should "have free access to the gate at the head of the canal, and draw and convey the water in the canal to his works below." The grantor covenanted, that the premises were free from

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incumbrance, "reserving the privilege as usual for Peter Hubbard to convey the water in a ditch into his interval below, forever."

In regard to this reservation, it appeared, that, in the deed under which Dryden derived his title, there was a reservation to Hubbard of "liberty to raise the water, where there is a mud sill now laid for that use, to water his mowing land."

Jepherson was now the owner of the water privilege conveyed to Morse.

Before the erection of Morse's dam, which took place in 1825, the water did not flow back upon Dryden's wheels, when there was no intervening obstruction, but afterwards it did flow back upon them six or seven inches. When Morse's dam was built, Dryden and Morse were present, and mutually agreed upon its height and length, and where it should be placed, and where the rolling part of the dam should be, and upon the length of that part. A small portion of the rolling part of the dam extended southerly upon the land of Dryden, beyond the line of the land conveyed by him to Morse, but the dam was built to the height and extent, and on the site marked out under the direction of Dryden and Morse; and Dryden recommended, that the diameter of the wheel at Morse's mill should not be less than thirteen feet.

When Hubbard put up his dam, which was placed between the dams of Dryden and Jepherson, occasionally to drive the water into the ditch referred to in the deed from Dryden to Morse, for the purpose of irrigation, the water flowed back upon Dryden's saw-mill wheels six or seven inches. Morse's dam was to be of a height sufficient to raise the water in his pond as high as it was raised by Hubbard in his trench, for irrigation; and Dryden was satisfied with Morse's dam after it was finished.

Morse offered to dig away the land below the rolling dam, in order to make a water-course through the southerly part of Dryden's land below the dam, but Dryden did not desire him to do so, saying that the water would cut its own channel through his land.

After the dam was built, Morse complained that he had not so good a privilege as he expected, and that Dryden had in

posed upon him ; and the matter having been referred to one Lees, Dryden then said, that if the dam should flow his wheels, he was willing to have them raised. Dryden then contemplated building a factory on the upper privilege. Afterwards, Dryden's tub-wheel was, by his request, raised, at the expense of Morse, from twelve to eighteen inches, leaving the bottom of it three inches above the level of Morse's pond.

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The second action was trespass *quare clausum fregit*, brought by Jepherson against Dryden.

It appeared, that on October 23d, 1835, Dryden gave Jepherson notice to lower his dam ; and that in consequence of Jepherson's not complying with the terms of the notice, Dryden cut a new water-course from Jepherson's pond into Dryden's own land, whereby the pond was lowered sixteen inches ; and the privilege became inadequate for a wheel of thirteen feet in diameter. The second action was brought to recover for this injury.

The judge directed that a verdict should be rendered for Jepherson, in both actions, subject to the opinion of the whole Court.

Barton, of counsel for Dryden, to the point, that if the acts of Dryden should be construed as a license operating to excuse the acts complained of in the first action, such license was executory and so revocable as to future purposes, cited *Cook v. Stearns*, 11 Mass. R. 533 ; *Whitney v. Holmes*, 15 Mass. R. 152 ; *Francis v. Boston and Roxbury Mill Corp.* 4 Pick. 365 ; *Gilmore v. Wilbur*, 12 Pick. 120 ; 1 Chitty's Gen. Pr. 338, and cases cited.

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C. Allen and *Washburn*, for Jepherson, to the point, that this was an executed license, and therefore irrevocable unless the licensee was indemnified for the expenses incurred by him in relation thereto, cited *Winter v. Brockwell*, 8 East, 308 ; *Heulins v. Shippam*, 5 Barn. & Cressw. 221 ; *Francis v. Boston and Roxbury Mill Corp.* 4 Pick. 365 ; that after the dam was erected with the consent and under the direction of Dryden, it was purchased by Jepherson in reference to the existing state of things, and Dryden was estopped to say, that his own privilege was injured thereby, *Wallis v. Truesdell*, 6 Pick. 457 ; *Nichols v. Arnold*, 8 Pick. 175 ; that evidence of

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acts done by the parties under a mutual agreement, immediately after the grant was made, by way of marking out the site and height of the dam, was competent for the purpose of determining the extent of the grant, *Makepeace v. Bancroft*, 12 Mass. R. 472 ; *Davis v. Rainsford*, 17 Mass. R. 211 ; *Allen v. Bates*, 6 Pick. 460 ; *Boynston v. Hees*, 8 Pick. 332 ; *Waterman v. Johnson*, 13 Pick. 267 ; *Neale v. Parkin*, 1 Esp. R. 229 ; *Ricker v. Kelly*, 1 Greenl. 117 ; and that the action of trespass *quare clausum* was rightly brought, *Wilson v. Smith*, 10 Wendell, 324 ; *White v. Moseley*, 8 Pick. 356 ; *Clap v. Draper*, 4 Mass. R. 266.

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SHAW C. J. delivered the opinion of the Court. The first action is case, and alleges two distinct grounds of complaint, both arising from a dam and pond of water, upheld and used by the defendant for mill purposes ; one, in throwing back-water upon the plaintiff's mills, and the other, in discharging water at the defendant's waste way, or rolling dam, in such a manner as to flood a portion of the plaintiff's meadow.

The title of the whole estate occupied both by the plaintiff and the defendant, is traced down to the plaintiff, and it is conceded that the plaintiff owned the whole of that estate, consisting of what may be called for distinction a lower and an upper mill privilege, until the middle of March 1825, at which time he made a conveyance of the lower privilege to one Morse ; and it is conceded, that the defendant now holds all the estate which was then conveyed by the plaintiff to Morse. It becomes, then, necessary to examine that conveyance, and the situation and circumstances of the estate at the time of the conveyance, and the acts of the parties, and ascertain what were the rights acquired by Morse under that conveyance. This deed alludes to a reservation in behalf of one Hubbard, of a right to keep up a dam on the premises now occupied by the defendant ; but as the defendant has no controversy with Hubbard, no further notice need be taken of this reservation. But a reference to Hubbard's dam may be useful for another purpose. It was proved, that the plaintiff consented and agreed by parol, that Morse's dam might be so erected as to raise the water as high as it had been formerly raised by Hubbard's dam for irrigation ; but as it was conceded, that after

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the dam built by Morse and now occupied by the defendant, was finished, the plaintiff was satisfied with it, it most fully establishes the fact otherwise stated in the report, that the dam, of the length, height, position and dimensions, as built by Morse, sold by him to the defendant, and since occupied by the defendant, was so built, with the knowledge and consent, and by the agreement and direction of the plaintiff. But as no right or interest in real estate can be conveyed by parol grant or agreement, however express and deliberate, it is contended that this agreement is unavailing ; and the defendant, in answer to the objection, relies upon two grounds ;

1. That the right to keep up and maintain the dam at its present height, was granted by the conveyance of the plaintiff to Morse ; and

2. That all the acts complained of were done by license of the plaintiff himself to Morse, and that the acts were of such a nature, that a parol license operated as a legal excuse for them.

The first question is upon the terms and legal effect of the conveyance. By this deed Dryden conveyed to Morse in fee, a tract of land, with a house and other buildings standing thereon, estimated at two acres and three quarters ; and it then proceeds to describe the land by metes and bounds ; the deed then adds, “ together with the privilege of a dam below said Dryden’s factory, and flowing the water, as high as will answer and not injure or obstruct the water wheels of said Dryden’s, above.” There are then stipulations respecting the use of the waters, limiting the grantee’s right to the natural and ordinary flow of the stream, exclusive of showers, freshets and thaws, and providing that if the grantor should refuse or neglect to let the water down, the grantee should have the right to go upon the grantor’s premises and open the gate. In the first place, it was contended by the grantor, that here was but one substantive grant, that of the land, and that the mill privilege is merely an incident, and that in consequence the grantee took no other privilege, than that which could be created on the land granted. . But we think that this is not the true construction. Upon this view of the grant, the words above cited would be wholly nugatory, inasmuch as the grantee of land would have a right to all the privi-

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leges which could be obtained on the land itself, without those words of grant. But the true intent of the deed appears to have been, to grant a privilege of building and maintaining a dam for a mill privilege, and if this purpose involved the necessity of using a portion of the grantor's land, to build the dam upon, it is necessarily a grant of the use of such land.

Taking this deed then to convey a distinct substantive right to erect a dam, and of course to flow the water to be raised by that dam, the question is, what was the extent and limit of that right, or in other words, to what height did the grantee acquire a right to raise the dam and to flow the water. The words are uncertain and indefinite. It is in terms the privilege of a dam and flowing the water as high as will answer, and not impair or obstruct the water wheels of Dryden's mill above. This description refers to facts not expressed in any part of the deed, and which cannot be inferred from any thing contained in it, and therefore, of necessity, warrants the admission of evidence *aliunde*. Parol evidence becomes necessary to show how high a dam could be raised, in the place designated, without injuring the grantor's mill wheels above, and also to ascertain what would be the height of a dam necessary to answer the object contemplated by the erection of it. This object is not expressed ; but as every grant made upon a valuable consideration must be presumed to be intended to be beneficial to the grantee, we must understand from these words, and the general tenor of the deed, that a useful privilege for mill purposes was intended. Compelled thus to resort to extrinsic evidence, to understand the terms of description used by the parties, we think that the evidence of what the parties did, by way of fixing limits to this grant, immediately after the grant was made, was competent, and it brings the case within that class of cases, in which it has been decided, that where parties to a deed, soon after its execution, in good faith and by mutual consent, place monuments to correspond with the deed, this act is taken to fix those monuments, and to define the limits of the grant. *Makepeace v. Bancroft*, 12 Mass. R. 472 ; *Davis v. Rainsford*, 17 Mass. R. 211 ; *Allen v. Bates*, 6 Pick. 460 ; *Waterman v. Johnson*, 13 Pick. 267. So it has been held, that a grant of a right to erect a dam within certain limits, becomes

certain, when the dam is built at a certain place within those limits, by mutual consent. *Boyn-ton v. Rees*, 8 Pick. 332.

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Taking this principle to be clear, and to be applicable to the present case, the evidence is conclusive to show, that soon after the grant, and with reference to it, the parties met and by mutual agreement, fixed upon the place of a dam, of a certain height and extent, as and for the dam, which the grantee had a right to build, by the terms of the grant. The grantee was to make known to the grantor, what height of dam would "answer," that is, would answer the purpose contemplated and intended by him, which was one part of the description; and the grantor would judge for himself and communicate to the grantee, what height of dam would be admissible, without obstructing his wheels above. When, therefore, they agreed to a dam of given height and length, they, in effect, determined, what were the limits of the grant, as expressed in the deed. That the parties intended thus to fix and define the limits of the right granted, is expressly found by the case, and the only question is, whether this intent, expressed by parol agreement and acts *in pais*, can be carried into effect, or whether this would be a violation of the rule of law, requiring all rights and interests in real estate to be manifested by some writing. We think it may be carried into effect without any violation of the rule in question. It is the common case of going into evidence *aliunde* to ascertain limits and monuments, left uncertain in the description; it identifies the subject intended by the deed, and then the right or estate passes, by the operation of the deed. The Court are, therefore, of opinion, that the defendant, Jepherson, did not exceed the right granted to his predecessor, Morse, by the plaintiff, and that this action cannot be maintained.

There is another action depending upon the same facts brought by Jepherson against Dryden. It is *trespass quare clausum fregit*, and brought for cutting through the plaintiff's dam, and letting off the water. It was contended, that even if the plaintiff had any legal remedy, it must be sought in an action of the case, and that trespass would not lie. It was left in a little doubt by the case as reported, whether the digging complained of, was around the end of the dam, on the defend

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ant's own land, or whether the cut was through the body of the dam, but it was conceded at the argument, that the cut was through the body of the dam. Still the defendant insists, that the cut was through that part of the dam, which was built on his own land, and, therefore, that the only injury was x letting off the water and not in breaking the plaintiff's close. It appears, that the cut was through that part of the dam, which was beyond the limits of the land granted by metes and bounds, but it was necessary thus to extend it over the grantor's land, in order to raise the water to the height agreed upon, as before stated. Upon the grounds before stated, the Court are of opinion, that the grant of the right to build a dam, of a given height and extent, was a grant or demise of so much of the grantor's land, as it would be necessary to occupy by such dam. Suppose a man, owning land on both sides of a stream not navigable, should grant to another the land on one side, bounded by the thread of the stream, and should, at the same time, grant a right to erect a mill on his own land, with a dam of sufficient height to raise water to drive such mill. As such dam could not raise the water, without being extended across the river, and, of course, one half upon the grantor's own land, such a grant would, by necessary implication, carry the right to build that part on the grantor's own land, and to occupy it as far as necessary to maintain the dam, so long as the dam should be kept up. This is similar ; it is a grant to use and occupy the grantor's land for the purpose of a dam so long as the dam is kept up. This is not a mere easement, but is to be deemed a freehold determinable upon the cessation of the mills, or as a demise, for the time the mills should continue. Such an interest is not a mere easement, but carries the right of possession, for a violation of which this action lies.

Judgment for Jepherson, in both actions.

**ZEBINA COOK *versus* THOMAS DARLING and
Trustee.**

In an action of debt on a judgment of the Court of Common Pleas, the judgment cannot be impeached or avoided as erroneous by plea ; but the remedy is by writ of error.

THIS was an action of debt on a judgment recovered by the plaintiff in the Court of Common Pleas for the county of Bristol, on the second Monday of March, 1822, for the sum of \$ 65.13. In the original writ upon which such judgment was recovered, the defendant was styled of Bellingham, in the county of Norfolk. The defendant pleaded, that at the time of the supposed service of the original writ upon him, he was not, and never had been, an inhabitant of this Commonwealth, and was not then commorant in Bellingham, that he had no notice of such action and did not appear to defend the same, and that he had no right or interest in the land attached therein.

The plaintiff demurred.

C. Allen, Thayer and Deane, for the plaintiff, cited 2 Co. Oct. 11th
Inst. 470 ; Com. Dig. *Pleader*, 3 L 10 ; *Allens v. Andrew*,
Cro. Eliz. 283 ; Bac. Abr. *Scire Facias*, E.

S. Allen, for the defendant, cited *Picquet v. Swan*, 5 Ma-
son, 35 ; *Hall v. Williams*, 6 Pick. 232.

Per Curiam. The Court are of opinion that the plea in Oct. 12th
bar is bad, and that the judgment declared on, cannot thus be
impeached collaterally, by plea. The judgment declared on,
is a domestic judgment, of a court of common law jurisdiction,
to which a writ of error lies, to reverse the judgment, if erro-
neous. But until reversed it must be taken to be conclusive.
A different rule may prevail in regard to decrees and adjudica-
tions of inferior courts, not proceeding according to the
course of the common law. If they exceed their jurisdiction,
or proceed contrary to law, the proceeding is void, and this
may be shown by plea ; but the principal reason is, because no
writ of error lies to reverse such judgment. *Smith v. Rice*,
11 Mass. R. 514.

ERASTUS DAVIS *versus* EDMUND J. MILLS.

Where a mortgage deed of personal property sets forth, that the mortgage is made to secure the payment of a promissory note on which the mortgagee is surety for the mortgager, proof of the execution and registry of such mortgage is *prima facie* evidence of title to the property in the mortgagee, without the production of the note, such note not being presumed to be in his possession ; and the burden of proof is on the party contesting the title of the mortgagee, to show that there was no such note.

REFLEVIN. On a case stated it appeared, that the action was brought to recover certain articles of household furniture mortgaged to the plaintiff by Reuben Waters junior, on August 5th, 1834, to secure the payment of a note described in the condition of the mortgage, as “ a certain note of hand bearing date on or about the first day of February last past, on which the said Reuben Waters junior is principal and the said Erastus Davis, [the plaintiff] surety, jointly and severally promising ” Samuel Taylor, “ to pay him or order the sum of five hundred dollars in the time therein specified ; ” that this mortgage was under seal, and was duly recorded ; and that subsequently the property mortgaged was attached by the defendant, a deputy sheriff, as the property of Waters.

The plaintiff produced in evidence, as the note referred to in the condition of the mortgage, a note for the sum of \$ 500, dated January 25th, 1834, signed by the plaintiff alone, payable to Waters or his order on demand with interest, and indorsed by him. Waters testified that this note was signed by the plaintiff, to enable the witness to obtain cash for it of Taylor ; that the witness received the money of Taylor, accordingly, and afterwards mortgaged the property in question to the plaintiff to secure him against his liability on such note ; that the mortgage was made while the note was in Taylor’s hands, and the note was described from recollection ; that there never was any other note given by the plaintiff, either as principal or surety, for the witness and negotiated to Taylor ; and that such note had been paid out of the proper estate of the plaintiff.

If the Court should be of opinion, that this evidence was admissible, and that it sustained the action for the plaintiff, the

defendant was to be defaulted ; otherwise the plaintiff was to become nonsuit, and the defendant to have his writ of return, with nominal damages.

Davis
v.
Mills.

Barton, for the plaintiff.

Oct. 11th.

C. Allen and *Clarke*, for the defendant.

SHAW C. J. delivered the opinion of the Court. In an action of replevin, by one claiming as mortgagee of personal property, against an officer, who has attached it as the property of a former owner, the defendant denies that the plaintiff has any title under his mortgage, on the ground of the supposed misdescription of the note referred to. But we think the defendant has mistaken the position in which he stands, in reference to this mortgage.

Oct. 12th

Proof of the execution and registry of the mortgage, is *primâ facie* evidence of title in the plaintiff. It is a defeasible title, but good till avoided by performance of the condition, and it is for the defendant, if he can, to show it avoided, by proving performance. The plaintiff has no occasion to produce or prove the note, because he does not hold it, it is not presumed to be in his possession, and the condition is to indemnify him against the payment of a note, on which he was surety for the mortgager, and held by a third person. It is then for the defendant to avoid the title made under this mortgage, and to show, that the note had been paid, or the plaintiff released, or that for some cause the plaintiff could not be damaged. To do this, he must offer and rely upon the parol proof stated in the case. If admitted, it proves that there was no other note, than the one described as held by Taylor, and that that was the note intended in the mortgage ; if rejected, it would leave the *primâ facie* title upon the mortgage, unimpeached ; and on either ground the plaintiff is entitled to recover

THE CENTRAL BANK *versus* CHARLES PRENTICE and Trustee.

A mortgagee of personal property, not in possession, is not chargeable as the trustee of the mortgager ; but a creditor of the mortgager may have a remedy under *St.* 1829, c. 124, [Revised Stat. c. 90, § 78 *et seq.*] as well where the mortgagee is in possession, as where he is not.

THE answer of the supposed trustee, Moses Adams, set forth, that the defendant, being indebted to him in the sum of about \$ 135, on October 19th, 1835, mortgaged to him certain articles of personal property of the alleged value of \$ 355, in order to secure the payment of a note for the sum of \$ 300 on demand ; that the property was never delivered to him and was never in his possession ; and that the mortgage was recorded.

It further appeared, that on August 31st, 1836, the trustee assigned the mortgage and the note to Jonathan Warren, and received his note for the sum of \$ 140, instead thereof.

In the Court of Common Pleas, the trustee was discharged. The plaintiff excepted.

Oct 11th. *Barton and Kinnicutt*, for the plaintiffs.

C. Allen, for the trustee.

Oct 12th. *Per Curiam.* The Court are of opinion, that a mortgagee of personal property, who is not in possession of the property, is not chargeable as the trustee of the mortgager. He is certainly not the debtor of the principal defendant, and has no *credit* to be charged ; and it is equally clear, that he has no goods, which could be surrendered up to an officer. But a creditor is not without remedy ; the *St.* 1829, c. 124, furnishes a remedy adapted as well to the case where the mortgagee is in possession, as where he is not. The decision of the Court of Common Pleas discharging the trustee upon his answer, we think was correct ; and the exception is overruled, and the judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF MIDDLESEX, OCTOBER TERM 1830,
AT CAMBRIDGE.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

BENJAMIN GALE *et ux.* versus SAMUEL A. COBURN.

A deed set forth, that the grantor, in consideration of the sum of \$ 3000 paid by the grantee, gave, granted, sold and conveyed to him certain land, "saving and reserving to the grantor, however, the right to use, occupy and enjoy, during his natural life, free of all rent or charge whatever and all molestation in the same," the granted premises. It appeared that the grantee had married the daughter of the grantor, and that she died before the execution of the deed, leaving children who were still alive. It was *held*, that the deed did not pass a freehold to the grantee, presently, and create a new estate for life in the grantor, by way of reservation, but created a freehold estate to commence *in future*, and consequently, if regarded as a feoffment or bargain and sale, was void ; but that it was a good covenant to stand seized to uses, the consanguinity between the grantor and his grandchildren being a sufficient consideration therefor, and it being competent to aver and prove such consideration, although a different one was set forth in the deed, and no allusion was made therein to such consanguinity ; and consequently that the deed vested the estate in the grantee, subject to the life estate of the grantor.

THIS was an action brought to recover certain land in **Dra-**
cut. The tenant pleaded the general issue.

Gale
v.
Coburn

It appeared that the demanded premises were formerly owned by James Varnum, deceased ; and that Varnum, in his will, devised to the female demandant, who was his daughter, such an interest in the premises, as would entitle the demandants to recover an undivided part thereof, unless the defence set up by the tenant was maintained.

The tenant offered in evidence a deed containing full covenants of seisin and warranty, dated October 16th, 1832, by which Varnum, in consideration of the sum of \$ 3000 alleged therein to have been paid by the tenant, gave, granted, sold and conveyed to him the land in question, " saving and reserving to myself, however, the right to use, occupy and enjoy, during my natural life, free of all rent or charge whatever and all molestation in the same, the said land and buildings hereby conveyed and granted," to have and to hold to him, his heirs and assigns.

The demandants objected to the admission of this deed in evidence, on the ground, that it did not operate to convey any interest in the land, it being, as they contended, an attempt to convey an estate of freehold commencing at a future time. But the objection was overruled, and the deed admitted in evidence. It further appeared, that the tenant married the daughter of Varnum, the grantor ; and that she died several years before the deed was executed, leaving two children who were still alive. It was stated at the trial, by the counsel for the tenant, that there was no other valuable consideration for the deed, than personal services rendered to the grantor by the tenant.

The jury returned a verdict for the tenant. The demandants excepted to the ruling of the judge.

Jan. 19th,
1836.

Hoar, Lawrence, Mellen and Robinson, for the demandants, to the point, that the deed could not operate as a bargain and sale, because it attempted to create an estate in fee to commence *in futuro*, cited *Parker v. Nichols*, 7 Pick. 111 ; and that it could not operate as a covenant on the part of the grantor, to stand seised to his own use during his life, and after his decease, to the use of the tenant and his heirs, because there was no consideration of marriage or consanguinity to give it that effect, and no pecuniary consideration, *Wallis v. Wallis*, 4 Mass. R. 136 ; *Welsh v. Foster*, 12 Mass. R. 93

Fletcher, Smith and Mann, for the tenant. The Court will carry into effect the intent of the parties so far as the law will permit. *Wallis v. Wallis*, 4 Mass. R. 136.

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v.
Coburn.

The deed in question created a *present* estate in fee ; and the interest reserved to the grantor was a distinct interest carved out of the estate granted.

Or if not, it is to be construed as a covenant, on the part of the grantor, to stand seised to uses ; and a pecuniary consideration is sufficient to support it as such. Besides, in this case, there is a sufficient consideration of marriage ; and it is not necessary that this consideration should be expressed in the deed, but it may be averred and proved. The death of the daughter makes no difference ; for the relation of son-in-law remains, and the children of the marriage are still living. *Wallis v. Wallis*, 4 Mass. R. 136 ; *Welsh v. Foster*, 12 Mass. R. 93 ; *Pray v. Pierce*, 7 Mass. R. 384 ; *Jackson v. Swart*, 20 Johns. R. 86 ; *Jackson v. Dunsbagh*, 1 Johns. Cas. 91 ; *Jackson v. Starts*, 11 Johns. R. 351 ; *Chester v. Willan*, 2 Wms's Saund. 96, note 1 ; 4 Cruise's Dig. 185 to 193.

The saving clause in the deed is an *exception* and not a reservation, and as such it is repugnant to the previous grant and void ; and so the grant takes effect. Co. Litt. 47 a.

SHAW C. J. delivered the opinion of the Court. In this case it is conceded, that the plaintiffs are entitled to recover a portion of the land in controversy, under a devise to the female plaintiff by her father, James Varnum, if he died seised ; and whether he did or not, depends upon the effect of a deed made in his lifetime to the defendant.

Oct. 19th

It was contended on the part of the plaintiffs, that the deed taken together, in legal effect created a freehold, commencing in *futuro*, by bargain and sale, which is contrary to the rules of law, and so was inoperative and void, and nothing passed by it.

To this it was answered and insisted for the defendant :
1. That in legal effect it created a freehold to commence immediately, and that the interest reserved to the grantor was not inconsistent with this view, being of a distinct and separate interest carved out of the estate granted ; and

2. That the deed was good to pass the estate, by way of covenant to stand seised.

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v.
Coburn.

This is a purely technical question, and upon some of the points involved in it the old authorities are numerous and contradictory.

In the first place, we think, that by any reasonable construction of this deed, it must be construed to create a freehold commencing *in futuro*, and that it would be a forced construction to consider it as passing a freehold to the grantee, presently, and creating a new estate for life to the grantor, by way of reservation. The whole and entire estate is reserved to the grantor for his life. The words, "the right to use, occupy and enjoy" an estate, in a grant, operate to transfer the estate, and create a freehold when such right is for life, and I see no reason why they should not have the same effect in a reservation or exception. And the words added in this deed, "free of all rent or charge whatever, and all molestation in the same," thereby vesting the entire possession and occupation, as well as the use and enjoyment, strengthen the conclusion derived from the use of those words, and constitute an absolute estate for life in the grantor. Whether a particular provision in a deed constitutes an exception or reservation, technically, does not depend on the use of the word "except," or the word "reserve," but upon the nature and legal effect of the provision itself. The effect of this deed, I think, is, to grant the land in fee to the grantee, but with this qualification, that the grantor is first to have a freehold estate in it for his own life. Such a conveyance, if regarded as a feoffment or bargain and sale, is contrary to the rules of law, and cannot be maintained.

Then the question arises, can it be supported as a covenant to stand seised.

Several points are perfectly clear.

1. The words of the deed are amply sufficient to constitute a covenant to stand seised. No particular words are necessary. The main intent is to be looked to, and if the intention is manifest, that the grantee shall have the land, whether the conveyance operate in the manner intended or not, is immaterial. The words "give and grant" are sufficient to constitute such a covenant. *Wilkinson v. Tranmarr*, Willes, 682; *S. C.* 2 *Wils.* 75.

2. The consideration of consanguinity was sufficient to sup-

port such a covenant. The general rule is, that the consideration must be consanguinity or marriage. The doubt suggested in the present case respecting the consideration of marriage, is this : supposing the consideration would have been good whilst the relation of husband and wife subsisted between the daughter of the grantor and the grantee, yet whether, after the death of such daughter and wife, the consideration of marriage could be considered as still subsisting. But it is not necessary to decide that point, because here was consanguinity. The grantor was the grandfather of two of the grantee's children. Kindred is sufficient without regard to the nearness or remoteness of the degree. But here might be an efficient or operating motive, and the grantor might well suppose, that the most effectual mode of advancing his grandchildren, was to vest the property in one, bound by every consideration of legal obligation, moral duty and parental affection, to provide for their maintenance, education and advancement.

3. It is exceedingly well settled by the authorities, that where the fact of consanguinity exists, it may be averred and relied upon, and shall be presumed to have operated as a consideration, in whole or in part, although it is not expressed in the deed as a consideration, and although the grantee or *cestui que use* is not mentioned as a child or other relation. The circumstance, therefore, that this consideration is not mentioned in the deed, will not prevent it from operating as a covenant to stand seised.

4. But the doubt which has occurred is this ; whether when one consideration is expressed and no allusion to any other is made, either in general terms or otherwise, no such phrase used as "divers good considerations," or after expressing one, "divers other, &c.," it is competent to aver and prove another good consideration. Upon this point the authorities are somewhat conflicting ; and probably it would be impossible to reconcile them.

On consideration, however, we are of opinion, that this ought not to be considered as an open question in this Commonwealth, since the decision of *Wallis v. Wallis*, 4 Mass. R. 135. The case is directly in point. It was a deed in common form, in consideration of \$400, with covenants of warranty,

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Coburn.

to hold after the death of the grantor. In fact, the grantee was the son of the grantor, but this fact is not mentioned or alluded to in the deed. It was held, that this fact might be averred, and the consideration of natural affection, being consistent with the pecuniary one, should be presumed, and would support the conveyance as a covenant to stand seised.

The principle of this case is recognized and affirmed in that of *Parker v. Nichols*, 7 Pick. 111. In that case, the whole consideration expressed in the deed was valuable, being services and the payment of money, and the only difference between that and *Wallis v. Wallis*, is, that the grantee is mentioned in the deed as the grandson of the grantor. The Court say, that a valuable consideration being expressed in the deed, a good one may be presumed, from the fact, that it appeared by the deed, that the grantee was the grandson of the grantor. So that if it were necessary in this State, as it seems to be in England, to prove a consideration of blood or marriage to support a covenant to stand seised to uses, it might be presumed in the case at bar, as it was in *Wallis v. Wallis*. We take it to be well settled, that whether this fact be expressed in the deed, or proved by evidence *aliunde*, is immaterial. A consideration not repugnant may be averred. *Bedell's case*, 1 Co. R. 4 ; *Crossing v. Scuddamore*, 1 Mod. 175 ; *S. C.* 2 Lev. 9 ; *S. C.* 1 Ventris, 137 ; *Milburn v. Salkeld*, Willes, 673 ; *Goodtitle v. Petto*, 2 Str. 934.

These authorities must, we think, be considered as decisive in this State. The case of *Wallis v. Wallis*, has stood nearly thirty years, and may be considered as constituting a rule of property.

The Court are, therefore, of opinion, that this deed was a good covenant to stand seised, and therefore, although it did create a freehold to commence *in futuro*, it was consistent with the rules of law, and vested the estate in the grantee, subject to the life estate of the grantor.

WILLIAM W. FULLER, Administrator, *versus*
ALEXANDER WRIGHT *et al.*

A mortgager of real estate whose equity of redemption had been attached by a creditor, in consideration of the sum of \$ 1200, conveyed the land to the defendants, without his wife releasing her right of dower, and the defendants, at the same time, signed an agreement, by which, after reciting that the land had been so conveyed and mortgaged, and was subject to other claims and incumbrances, they promised the mortgager to pay him the sum of \$ 1200, "after he has cleared and freed said premises from all *claims* and *incumbrances*, or the balance, if any there shall be, after having satisfied said claims and removed said *incumbrances*, ourselves." It was *held*, that the inchoate right of dower of the wife, was not a *claim* or *incumbrance* contemplated by such agreement.

In an action against two, by the administrator of an insolvent estate, upon a joint debt, the defendants are not entitled to set off their several claims, allowed by the commissioners of insolvency, against the insolvent estate.

ASSUMPSIT on the following contract, which was signed by the defendants : "Whereas Richard Messiter [the plaintiff's intestate] has, by his deed dated September 6th, 1831, conveyed to us a certain lot of land, with the buildings thereon, situate in said Lowell, which said land has been mortgaged to sundry persons, and is subject to other claims and incumbrances, in consideration of which conveyance we hereby promise the said Messiter to pay to him the sum of twelve hundred dollars, after he has cleared and freed said premises from all claims and incumbrances, or the balance, if any there shall be, after having satisfied said claims and removed said incumbrances, ourselves. Lowell, September 6th, 1831." This agreement was signed by the defendants.

On a case stated, it appeared, that the consideration to be paid by the defendants for the land clear of incumbrances, was the sum of \$ 1200, as recited in the deed ; but no part thereof was paid to Messiter at the time of the conveyance. The land, when conveyed, was incumbered with a mortgage made by Messiter to Jonathan C. Morrill, on September 21st, 1830, to secure the payment of \$ 300 with interest, and also with a mortgage made to William Whitney, on October 5th, 1830, to secure the payment of \$ 300 with interest. The mortgage to Morrill was made at the time of the conveyance of the premises to Messiter by Morrill. Nothing had been paid by Messi-

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v.
Wright.

ter on either of these mortgages ; and the defendants, in November, 1831, paid the amount due, and took an assignment of the mortgages.

At the time of the conveyance by Messiter to the defendants, his equity of redemption in the premises had been attached at the suit of Mansur & Reed ; and afterwards, on November 17th, 1831, the same was sold by public auction to the defendants for the sum of \$ 50, under an execution issued upon the judgment recovered by Mansur & Reed in such suit.

The wife of Messiter released her right of dower in the mortgage to Whitney, but not in the mortgage to Morrill, nor in the conveyance to the defendants ; and, upon the death of Messiter, on November 15th, 1831, she, having a right of dower in the equity of redemption, filed her bill in equity to redeem, for the purpose of obtaining her dower.

There were no other claims or incumbrances on the premises except those above mentioned, at the time of the conveyance by Messiter to the defendants.

At the time of his decease, Messiter was indebted to each of the defendants, severally ; and his estate having been represented to be insolvent, the commissioners of insolvency allowed the sum of \$ 304·86 to Wright, and the sum of \$ 97·34 to Southwick, the other defendant.

If the Court should be of opinion, that the action was maintainable upon these facts, the defendants were to be defaulted, and judgment to be rendered for the plaintiff, for such sum as the Court should determine upon ; otherwise the plaintiff was to become nonsuit.

Jan. 21st,
1836.

W. W. Fuller, pro se, to the point, that the inchoate right to dower in the equity of redemption, was not a claim or incumbrance within the meaning of the contract in question, cited *Ellis v. Weld*, 6 Mass. R. 250 ; *Powell v. Monson and Brimfield Manuf. Co.*, 3 Mason, 347 ; and that the several claims of the defendants, not having been filed according to the statute, could not be set off against the joint debt due to the estate, *Grew v. Burditt*, 9 Pick. 271 ; *Sargent v. Southgate*, 5 Pick. 320.

Farley and Robinson, for the defendants, to the point, that the inchoate right of dower was an incumbrance within the

ing of the agreement, cited *Prescott v. Trueman*, 4 Mass.
; 4 Dane's Abr. 347; *Porter v. Noyes*, 2 Greenleaf,
v. *Gardner*, 10 Johns. R. 266; *Estabrook v.*
0 Mass. R. 313; and that the several claims of
might be set off, *McDonald v. Webster*, 2 Mass.
v. *Lee*, 3 Pick. 452; *Hathaway v. Russell*,

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delivered the opinion of the Court. The Oct. 19th

the inchoate right of dower was a claim
the meaning of the defendants' agree-
the intestate was bound to extinguish, before he
claim the purchase money for the land. The Court are
of opinion, that it was not. Whether under all circumstances
an inchoate right of dower, where husband and wife are both
living, shall be deemed an incumbrance, is a question which
must depend upon the contract and the circumstances. It is
true that it is no estate or interest, but only a possibility. But
it is a possibility which may give the wife an estate, by the
happening of a contingent event, the death of her husband,
without any new act to be done, or new right to be acquired.
Upon an executory contract, by which one, for a certain sum,
should engage to transfer land, or procure for another a transfer
of land, by a good and indefeasible title, free of all claims and
incumbrances, it would be reasonable to consider it as the in-
tent of the parties, that for the sum named, the covenantee
should have a complete title, free of actually existing claims of
dower. But we think no general rule can be laid down, to
determine absolutely whether such inchoate right of dower is
an incumbrance; it must depend on many and various circum-
stances and considerations.

The question in this case is, whether it was intended that
the payment of the purchase money should be suspended until
the intestate should procure a release and extinguishment of his
wife's right of dower. The deed by which Messiter conveyed
to the defendants had been already made, and the dower was
not released. If it was intended or expected that she should
release it, the probability is, that it would have been done
then.

Further, the consideration which they agreed to pay for the

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grantor's interest in the land, was \$1200, as recited in the deed, and that without the release of the right of dower. The stipulation in the contract was to pay \$1200, in extinguishing incumbrances, and the balance to the grantor. It seems, therefore, they must have had in view incumbrances and liens which could be paid and extinguished by money, to be computed towards payment of the consideration. It therefore could not include an inchoate right of dower. The effect of the construction contended for by the defendants would be, to suspend the payment of the consideration to the grantor during the joint lives of himself and his wife, which could not have been the intention of the parties. On the whole, we think it was the intention of the defendants to give \$1200 for such a title as the intestate could make therein, without his wife's joining to release her dower; and the claims and incumbrances intended were the mortgages and attachments. The circumstance that the husband so soon died, leaving his wife surviving, by which the amount of the right of dower was greatly enhanced, can make no difference; the present question depends entirely on what the parties understood and intended at the time.

On the other point, the Court are of opinion, that it is not competent for the defendants to set off their several individual claims upon the estate against the claim of the administrator against them jointly, but that the administrator has a right to receive the balance, for the benefit of the creditors generally.

**URIEL CROCKER *et al.* versus THOMAS J. BAKER
and Trustees.**

The provision in *St.* 1822, c. 93, [Revised Stat. c. 90, § 58,] authorizing the sale of goods attached on *mesne* process, upon the request of either of the parties to the action, is not limited to live stock and goods of a perishable nature, but extends to any chattel which is liable to depreciate greatly in value by keeping, or which cannot be kept without great and disproportionate expense.

The certificate of the appraisers appointed under the statute, that the goods attached are liable to depreciate, and that the keeping of them will require great expense disproportionate to their value, is conclusive evidence of these facts, in justification of a sale by the officer.

Notice to the defendant, that the plaintiff has applied to the officer to make sale of the goods on *mesne* process, and that the defendant may appoint one of the appraisers, may be given by leaving a written notification at the defendant's usual place of abode.

The giving a credit to the purchaser of the goods will not invalidate the sale ; but it seems it will render the officer responsible for the price.

Where the defendant in a trustee process is defaulted at the return term, and the trustee appears at the same term and submits himself to an examination upon oath, and the case is continued in court for the purpose of determining whether he is chargeable or not, and he is ultimately discharged, he is entitled to tax costs for his travel and attendance, in the same manner as a prevailing party.

ASSUMPSIT. The action was entered in the Court of Common Pleas, at September term 1833, at which term Baker, the principal defendant, was defaulted, and the trustees filed their several answers, denying generally that they were trustees of Baker when the process was served on them. The action was continued to the then next December term of the same court, and in the vacation the respondents voluntarily submitted to an examination on oath, in answer to the interrogatories proposed by the plaintiffs. This examination was made and sworn to in the country, by the consent of the plaintiff, and was duly filed in the Common Pleas, at December term 1833 ; and after argument before all the justices of that court, the respondents were adjudged not trustees and were allowed costs. From this judgment the plaintiffs appealed, and they entered their appeal in this Court, at April term 1834.

John Kimball, one of the respondents, stated in his answers, that on the 17th of July, 1833, he, as a deputy sheriff, attached certain goods of Baker on several writs against him ; that on the 23d of July. application, in writing, was made to him

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v.
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by the attaching creditors, to have appraisers appointed and to have the goods sold ; that of this fact he gave Baker due notice in writing, which he left at Baker's usual place of abode, in Lowell, and requested him to select one appraiser ; that Baker having neglected to do so, the respondent appointed two appraisers on the 24th of July and the attaching creditors a third ; that on the same day the appraisers, being duly sworn, examined the goods, and made a schedule of them, and set down the appraised value of them, and certified that in their opinion the goods were " liable to perish, waste, or greatly depreciate in value, and that the keeping of the same would require great expense, disproportionate to the value of said property ;" that thereupon the respondent proceeded to sell the goods at public auction, on the 1st of August ; that some of the goods were sold on credit, and some for cash ; that the amount of the proceeds of the sale was \$ 688·63, which sum the respondent applied to defray the expenses of the sale and in part-satisfaction of the executions of the attaching creditors, the whole amount of which exceeded \$ 1,000 ; that the respondent believed that Baker was not at home when the notification was left for him, but whether he had absconded or not, or whether he ever received the notification, the respondent could not say ; and that subsequently Baker, together with the attaching creditors, signed a written agreement assenting to the sale and other proceedings, but the respondent did not know at what time this assent was given.

E. P. Offutt and T. Sweetser, two other respondents, stated that they were purchasers of some of the goods ; and they adopted the answers of Kimball, so far as relates to the ownership and disposition of the property.

By the schedule made out by the appraisers, it appeared that the property attached and sold on mesne process consisted of a great variety of articles, being the stock of a dealer in fancy goods.

Feb. 27th,
1834.

F. Hilliard, for the plaintiffs.

W. W. Fuller, for the trustees.

April term
1835.

MORTON J. afterward drew up the opinion of the Court. The plaintiff attempts to charge the officer who sold, and the other trustees who purchased, the goods of the principal de-

pendant. His ground is, that the sale was unauthorized ; that it dissolved the former attachments ; that the purchasers acquired no property under it, and therefore that the officer is trustee for the proceeds of the sale, received by him, and the several purchasers for the goods remaining in their hands. The first step in support of this claim is to show the invalidity of the sale. For if the officer's proceedings were according to law, the fruits of the sale have rightfully been applied, under prior attachments. Unless these were dissolved, the plaintiff has no right to interpose.

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Previous to the statute of 1822, c. 93, the officer holding goods under attachment had no authority to sell them, even with the consent of the parties to the suit, but whatever might be their nature or character, was bound to retain them till after judgment, in order that they might be seized on execution. *Rich et al. v. Bell*, 16 Mass. R. 294. Hence perishable chattels and such as could not be preserved and restored in an unchanged condition, were holden not to be attachable. *Bond v. Ward*, 7 Mass. R. 123. But it is very obvious that there are other kinds of chattels which may deteriorate, or become unsaleable, by keeping, or which it would be very expensive to keep. To remedy the evils arising in all these cases, the above statute was enacted.

The first section authorizes a sale before judgment, by the consent of the parties to the suits upon which the property is attached. It extends to all kinds of personal property and is imperative upon the officer. "Whenever the respective parties shall express their consent in writing, that the same may be sold, it shall be the duty of the attaching officer to cause the same to be sold," and to retain the proceeds, "to respond the judgment to be rendered, in the same manner" as if the goods had remained unsold.

The second section provides, that "whenever any live stock, or any goods, chattels or merchandise, which may be liable to perisl., waste or greatly depreciate in value, by keeping, or which cannot be kept without great and disproportionate expense, shall be attached on mesne process," "it shall be lawful for either of the parties to apply to the attaching officer, to have such goods examined and appraised ; and thereupon

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it shall be the duty of such officer" to cause appraisers to be appointed in the manner prescribed by the statute. "And in case such appraisers, or the major part of them, shall be of opinion that such property, or any part thereof, is liable to perish, waste, or depreciate, and that the keeping of the same will require great expense, disproportionate to their value, it shall be their duty so to certify"; and to make an appraisalment of the property. "And it shall be the duty of such officer, to cause the goods thus certified and appraised, to be sold," "unless security be given for the appraised value thereof."

There is no doubt that the officer complied with all the formalities required by the statute. The written notice left at the debtor's usual place of abode was sufficient. This is the common and recognized mode of giving notice and making service in this Commonwealth. As the debtor had no attorney and was not to be found, it was the only notice which could be given. And if this be not good, it will be easy for the debtor, at all times, to defeat these salutary provisions of the statute. As the debtor neglected to nominate an appraiser, the duty of nominating one for him devolved upon the officer. The sale therefore was valid, provided an occasion had occurred which would authorize the officer to sell on mesne process.

These new provisions of law, which were recommended in *Bond v. Ward*, and again suggested in *Rich v. Bell*, were not intended to affect the liability of property to attachment; or to change the modes of seizing property on mesne process or execution, but to regulate the treatment of it in certain cases, while under attachment, and to avoid the great expense and loss to which certain kinds of property might be liable, in the long detention which intervenes between the commencement of a suit and the final judgment. They authorize a sale in certain specified cases. The plaintiff contends that none of these cases had occurred, and, therefore, that the officer had no power to sell.

This section authorizes a sale, without the consent of the parties, in the following cases; 1st, when the property attached is "live stock"; 2d, when by keeping it may be "liable to perish"; 3d, when it may be liable to "waste"; 4th, when it may be liable "greatly to depreciate in value"; and

5th, when it "cannot be kept *without great and disproportionate expense.*" Who is to determine when a state of things has occurred which authorizes a sale? Are the parties or either of them? Is the officer? Or must he proceed at his peril, liable to be made a tort-feazor, by proceeding or refusing, according as the facts may be subsequently determined by another tribunal? This would be perilous indeed to the officer. But we think the statute exposes him to no such hardship. It provides a form and points out the means of proceeding, to have the questions determined.

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If either of the parties suppose that the situation or state of the property attached is such as to require a sale by the rules prescribed in the statute, he may "apply to the attaching officer, to have such goods examined and appraised. And thereupon it shall be the duty of such officer" to proceed in the manner mentioned in the statute, to have appraisers appointed and sworn. "And it shall be the duty of such appraisers" to judge whether any of the events have occurred which require a sale of the property attached; and if so, to appraise the same, and to certify their opinion and appraisement to the attaching officer. "And it shall be the duty of such officer, to cause the goods thus certified and appraised, to be sold," unless security be given according to the statute.

It is manifest from these provisions, that the power of judging whether the state of the goods attached requires a sale on mesne process, is not vested in the officer. This power is given to a tribunal to be constituted expressly for the purpose. The officer cannot even institute an inquiry. He can only act on motion of one of the parties. If neither of them applies to him, the law requires him to retain the goods in kind, to meet the execution. But if either of the parties make the proper representation, he is bound to proceed. It is the right of either party to have the inquiry made and the question settled in the way provided in the statute. And the proceedings of appraisers duly appointed are conclusive upon the officer. If they certify that a case requiring a sale exists, he is bound to sell, unless security be given. But if they certify that no such case exists, he has no authority to make sale. He has no option. If a bond with sufficient sureties be offered, he is bound to re-

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ceive it and restore the goods to the debtor. The duty of the officer which is specifically pointed out, is, throughout, ministerial and imperative. If he follows the directions of the statute, he will be justified by it. If he violates them, he will be officially responsible.

It will not be necessary, if useful, to inquire whether the act of the appraisers is to be denominated a judicial or a ministerial act. The statute gives them important discretionary powers. Their determination, like that of appraisers of real estate in the levy of an execution, is, for many purposes, conclusive, and will always furnish a rule for the government of the officer, which he will be fully justified in following.

It is true that fraud and corruption vitiate every thing which they contaminate. But there is nothing in the case which has the slightest tendency to show error or mistake, much less corruption, in the appraisers. Indeed were we, instead of regarding their opinion, to revise their proceedings, we should, at once, come to the same conclusion. The most cursory inspection of the schedule of the property attached, will show, that the interest of the parties and the directions of the statute, alike demanded an immediate sale.

We do not perceive that the credit given by the officer forms any objection to the validity of the sale. The goods would not sell for less on a credit than they would for cash. The officer might, and probably would, make himself responsible for the price. But neither debtors nor creditors would be liable to suffer. Nor does the statute expressly or by implication, prohibit this mode of sale.

This case is distinguishable from *Prouty v. French*, 2 Pick. 586. There other objections were raised, besides the credit given. The goods never were delivered but retained as security, and might again revert in the officer, to be sold a second time, perhaps under unfavorable circumstances. It was in effect a conditional sale which never had been, and possibly never would be, completed.

That sale, too, was regulated by a statute entirely different from this. There a speedy sale was indispensable. The proceeds were needed for the immediate satisfaction of the execution on which the sale had been made. Here the object is to

hold them, in some form or other, till judgment shall be rendered. In short, we can see no analogy between the two statutes or the two cases. The objections which were fatal in that case do not apply to this.

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The proceedings of the officer being legal, the property vested in the purchasers; the officer was justified in applying the proceeds to the satisfaction of the executions, and all the trustees must be discharged.

Costs having been allowed to the trustees, a question arose as to the rule of taxation; upon which the opinion of the Court was delivered by

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MORTON J. By *St.* 1794, c. 65, § 3, trustees, appearing at the first term and by their answers denying that they have any effects of the principal, are, upon their discharge by the court, to be allowed their "legal costs." *Chapman v. Phillips*, 8 Pick. 27. But what shall be deemed "*legal costs*," is the question between the parties. The plaintiffs contend that the trustees resemble witnesses more than parties, and should be allowed pay for attendance, only while they actually attend. But the trustees insist that after the default of the principal, they assume the character of parties and are obliged to be in court, at all times, by themselves or their representative, and are, therefore, entitled to the same costs as other parties. Trustees certainly have, in many respects, the rights of parties. They may, by their appearance and on their motion, have the action continued. They may also appeal from the judgment of the Common Pleas in relation to them; and such appeal will bring not the trustee question only, but the whole action before this Court. When trustees are *charged* or *discharged*, they cease to have any further interest in the suit, and afterwards they can, in no light, be regarded as parties or have any claim for costs. *Hoyt v. Sprague & Trs.* 12 Pick. 414. But when the principal defendant has been defaulted, and the cause is continued in court for the purpose of determining whether the trustees are chargeable or not, they become the litigant parties; and if they prevail, "the court shall award them their legal costs," to be taxed in the same manner as the costs of other prevailing parties are taxed. The

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expression "*legal costs*," which by its use in the statutes and in courts, has acquired a precise definition, means costs to be taxed according to the fee bill.

The trustees cannot be allowed any thing for counsel fees or for preparing their answers. As in case of ordinary parties, the taxable costs are to be taken, however incorrect the assumption, to be a remuneration for these and all other expenses.

The rule is different where the trustees are charged. There may be no good reason for the distinction ; but the statute of 1829, c. 128, expressly allows them to retain out of the funds attached, " an amount sufficient to pay their reasonable counsel fees and other necessary expenses," to be determined by the court. Before this statute, trustees who were charged and could not recover taxable costs, had no means of remunerating themselves. *Adams v. Cordis*, 8 Pick. 270. And unless the legislature think proper to interpose, trustees who are discharged can recover only such costs as are allowed to other prevailing parties.

LUTHER GOODNOW *versus* NOAH SMITH *et al.*

In an action upon the joint and several promissory note of A. and S., brought against both promisors, A. was defaulted, and S. set up, as a defence, an agreement made between him and the plaintiff, before the note became due, by the terms of which the plaintiff exonerated and discharged S. from the payment of one half of the note, upon his then paying the other half and receiving of the plaintiff, at par, a note of a third person indorsed without recourse to the plaintiff. It was *held*, that the agreement was founded on a good and sufficient consideration ; and that it was a good defence to the action so far as respected S. ; but that under *St. 1834, c. 189*, [Revised Stat. c. 100, § 7,] the plaintiff was entitled to judgment against A.

THIS was assumpsit on a joint and several promissory note, for the sum of \$551, made by the defendants, Noah Smith and Josiah H. Adams, dated February 26th, 1827, and payable, one half in one year, and one half in two years, from April then next ensuing. Adams was defaulted. Smith pleaded the general issue.

At the trial, before *Shaw* C. J., the defence set up was, that in the autumn of 1827, before either of the instalments of the note became due, it was agreed between the plaintiff and Smith, that if Smith would then pay one half of the note and

take of the plaintiff, at par, a note for \$ 21.14, which he held against one Willis, the plaintiff would exonerate and discharge Smith from the payment of the other half of this note ; and that Smith, in pursuance of this agreement, then paid one half of the principal of the note and the interest, which was indorsed thereon, and took Willis's note at par, indorsed by the plaintiff without recourse.

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The jury were instructed ; 1. That if such agreement was made, as stated, the payment of one half of the note before the first instalment became due, and the taking of the note of Willis, constituted a good and sufficient legal consideration for the agreement.

2. That an agreement forever to exonerate and discharge the defendant from the payment of the other half of the note, the note being several as well as joint, and the holder therefore having a legal remedy against the other promiser without joining Smith, was, in effect, an agreement never to call on or sue Smith ; and that to avoid circuitry of action, such an agreement must be taken, in law, to be equivalent to a release.

3. That such a release might be given in evidence under the general issue ; and, therefore, that if it were proved that such an agreement was made and executed, as stated, the jury would find a verdict for the defendant.

The jury returned a verdict for the defendant.

If the Court should be of opinion that these directions were erroneous, a new trial was to be granted.

Farley and Mellen, for the plaintiff.

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Hoar and Mann, for the defendant.

WILDE J. delivered the opinion of the Court. This case turns on the distinction between a technical release, and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas, a covenant with one not to sue him, is not to be construed as a release, so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities. In the case of *Lacy v. Kynaston*, 2 Salk. 575, which was an action on a joint and several obligation, it was decided, that a covenant not to sue one of the obligors, would not operate as a defeasance or re-

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lease, because, to construe it so, would discharge the other obligor ; but if the covenantee had been the sole obligor, then the covenant, although not a release in its nature, should be so construed, to avoid circuity of action. The same principles were laid down in the case of *Dean v. Newhall*, 8 T. R. 168. That also was an action on a joint and several bond, and the defendant pleaded a release to Taylor, the other obligor, upon which issue was joined. At the trial, it appeared, that the plaintiff had covenanted not to sue Taylor, and in the deed of covenant he had agreed, that in case he should sue, &c. that deed " should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the said C. Taylor, &c., and as such should and might be pleaded in bar by him the said C. Taylor." Notwithstanding this agreement, it was held, that the covenant could not be pleaded in bar as a release and discharge, on the distinction laid down in the case of *Lacy v. Kynaston*, and in other cases there cited. And these decisions are approved and confirmed in *Hutton v. Eyre*, 6 Taunt. 289 ; in *Rowley v. Stoddard*, 7 Johns. R. 20 ; in *Shed v. Peirce*, 17 Mass. R. 623 ; and in *Harrison v. Close*, 2 Johns. R. 448. It is, therefore, a well established principle, that although an actual release to one of two joint and several obligors or promisors is a discharge of the debt, and consequently may be pleaded in bar by both of the obligors or promisors, yet that a covenant or agreement with one of several joint obligors, not to sue him, cannot be so pleaded. For if such a covenant or promise not to sue were allowed to operate as a discharge of one of several joint promisors or obligors, the creditor could have no remedy against the other obligor or promisor, although he had expressly or impliedly reserved the right to proceed against him. This consequence would not follow if the obligation or promise were joint and several ; for in such a case the creditor might sue the party with whom no agreement had been made, and there would be no necessity for his resorting to a joint action. But if on this distinction the matter relied on by the defendant, Smith, would amount to a defence to the whole action at common law, the plaintiff being entitled to a separate action against Adams, yet since the *St.* 1834, c. 189, no such defence can be

maintained. For by that statute the plaintiff is entitled to have judgment against Adams, and Smith may defend himself, we think, in this action, in the same manner as he could if the action had been brought against him alone.

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It is objected, that there was no consideration for the agreement with Smith, but certainly the payment of half the note before it was due, and taking the note of Willis at par, was a sufficient consideration.

We are of opinion, therefore, that the plaintiff is entitled to judgment against Adams, and that Smith is entitled to judgment for his costs.

JEREMIAH GAY *et al. versus* WILLIAM
RICHARDSON.

If a writ against two is served on only one of them, and judgment is rendered against both, both must join in a writ of error to reverse the judgment.

Error will not lie to reverse a judgment which might have been appealed from ; but where a judgment is rendered against a defendant who has not had due notice of the suit, he has no opportunity to appeal, and may maintain a writ of error ; and if one of several defendants has had notice, but has neglected to appeal, this will not affect the others.

The statutes of 1797, c. 50, and 1828, c. 114, requiring the continuance of an action brought against a person out of the State, does not extend to actions commenced before a justice of the peace.

The provision in Revised Stat. c. 112, § 14, giving costs to the party prevailing on a writ of error, was held not to apply to a judgment reversed after those statutes went into operation, on a writ of error brought before that event.

WRIT of error, dated the 26th of September, 1835, to reverse a judgment rendered by B. Wyman, a justice of the peace. The original action was assumpsit on an account against four defendants, three of whom were styled in the original writ, of Stockbridge, in Vermont, and the fourth, commorant in Woburn, in this county. Property of the four defendants was attached, and a sunmons was left with the one commorant in Woburn, but no summons was left with the other three, or with any agent for them ; and judgment was rendered, on the return day, against the four, no one of them appearing. The four joined in this writ of error.

Richardson, for the defendant in error, moved that the writ

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Gay of error might be quashed, on the ground that an appeal was
 Richardson. the proper remedy for the other party.

A. Peabody and A. Bartlett, for the plaintiffs in error.

Oct. 22d. MORTON J. delivered the opinion of the Court. There is no doubt that the writ was properly and necessarily brought in the name of all the original defendants. All the individuals composing the party who complains of a judgment, must join in a writ of error to reverse it. *Brewer v. Turner*, 1 Strange, 233 ; *Cooper v. Ginger*, 1 Strange, 606 ; *Walter v. Stokoe*, 1 Ld. Raym. 71 ; *Andrews v. Bosworth*, 3 Mass. R. 223 ; *Shirley v. Lunenburgh*, 11 Mass. R. 383.

It is generally true, that error will not lie to reverse a judgment which might have been appealed from. *Savage v. Gulliver*, 4 Mass. R. 178 ; *Champion v. Brooks*, 9 Mass. R. 228. But persons who were not notified of the suit, or were incompetent to act, cannot, with any propriety, be said to have had an opportunity to appeal. And, therefore, they may maintain a writ of error. *Skipwith v. Hill*, 2 Mass. R. 35 ; *Putnam v. Churchill*, 4 Mass. R. 517 ; *Vallier v. Hart*, 11 Mass. R. 300.

And although one of the original defendants had notice of the action and might have appealed, yet his neglect cannot bind his co-defendants, who are now obliged to join him in a suit to reverse a judgment against them of which they had no notice.

The service upon one of four defendants, was manifestly insufficient. It might have warranted a judgment against the one upon whom service had been made ; but a joint judgment against all of them is clearly erroneous. *Tappan v. Brewer*, 5 Mass. R. 193 ; *Call v. Hagger*, 8 Mass. R. 423.

The statutes of 1797, c. 50, § 6, and of 1828, c. 114, do not extend to justices of the peace. But if they did, they have not been complied with in this case. *Arnold v. Tourtelot*, 13 Pick. 172.

Judgment reversed.

The plaintiffs in error claimed costs, under Revised Stat. c. 112, § 14, which provides that "the party prevailing on a writ of error in any civil action, shall, in all cases, be entitled

to his costs against the adverse party ;” but the Court were of opinion, that as the writ of error was brought before the Revised Statutes went into operation, the case was excepted from that provision by virtue of Revised Stat. c. 146, § 5, limiting the effect of the repeal of the acts revised.

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GEORGE FLETCHER *versus* THE COMMONWEALTH
INSURANCE COMPANY.

The plaintiff obtained insurance against fire on his one story framed store, occupied by him, without disclosing the fact that it stood on the land of another person under a verbal agreement terminable, at the pleasure of such person, upon six months notice, neither was any inquiry made by the insurers in regard to his title. It was held, that there was not a concealment of a material fact, and that the policy therefore was not void.

ASSUMPSIT on a policy of insurance effected by the plaintiff for \$ 800, viz. \$ 150 on his one story framed store, situate on the Bucknam road in Medford, and occupied by him, and \$ 650 on his stock in trade contained in the store. The store and stock in trade were consumed by fire on the 23d of February, 1835.

At the trial, before *Shaw C. J.*, it appeared that the plaintiff applied at the defendants’ office to procure insurance, and requested them to insure the above sums on his store and stock. No written application or representation was made or required ; and no other particulars in relation to the property were communicated to the defendants ; nor were any further inquiries made.

One Bucknam owned the land on which the store had been placed, and he had agreed that the plaintiff might move the store on to the land and keep it there, paying an annual rent, for five years, unless Bucknam should request him to remove it, in which case he should have six months’ notice. There was no writing between Bucknam and the plaintiff in relation to the store or the land.

Upon this evidence it was contended, that facts material to the risk had been suppressed or not disclosed, which it was the duty of the assured to have disclosed, and that thereby the

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policy was rendered void. But the Chief Justice instructed the jury, that it was not the plaintiff's duty to give a more particular representation of the nature of his interest, without inquiry being made of him; that if the defendants wished for a more particular description in this respect, it was their duty to inquire, in which case it would have been the duty of the plaintiff to state truly the nature of his interest; but that under the circumstances above mentioned, there was no such misrepresentation as would avoid the policy.

A verdict was returned for the plaintiff, which the defendants moved to set aside on the ground that the instruction to the jury was erroneous.

Oct. 21st. *Farley*, for the defendants, cited *Williams v. Delafield*, 2 Caines's R. 329; *Livingston v. Delafield*, 1 Johns. R. 522; *Hodgson v. Richardson*, 1 W. Bl. 463; *Seaman v. Fonnereau*, 2 Str. 1183; *Macdowall v. Fraser*, 1 Doug. 260

Aylwin and *H. H. Fuller*, for the plaintiff, cited *Locke v. North Amer. Ins. Co.* 13 Mass. R. 61; *Curry v. Commonwealth Ins. Co.* 10 Pick. 535; *Tyler v. Aetna F. Ins. Co.* 12 Wendell, 572; *Dobson v. Sotheby*, 1 Moody & Malkin, 30; *Friedlander v. London Ass. Co.* 1 Moody & Rob. 171.

Oct. 22d PUTNAM J. delivered the opinion of the Court. If the concealment was material, it will avoid the policy notwithstanding the assured did not intend to commit any fraud. And it is true that the materiality of the fact concealed is a question for the jury. These general principles are well established. But the assured may well be silent as to various matters connected with or having some relation to the property insured, without any prejudice to his insurance, provided that such silence was not intended to deceive or to defraud the underwriter. *Aliud est celare, aliud tacere*. In the case at bar the defendants say, that the plaintiff withheld information which was material to the risk, and which, therefore, ought to have been communicated. And the fact so withheld is stated to be, that the plaintiff did not inform the defendants who owned the land on which the building stood. Now it seems to us very clear, that it was not necessary that he should. He stated his property in the building, goods, &c. &c. He stated in what town and street it stood. He stated every thing truly. And it

seems to us that if the defendants wanted any further information, they should have requested it. Now it is contended the land belonged to another, that there was a right reserved for the owner to cause the plaintiff to remove his store in a certain time, and as his tenure was such, he would be less careful of the property, and so the risk would be greater than it would be if the plaintiff owned the land as well as the building. We think this is more ingenious than substantial. If in truth the plaintiff owned the land upon which his building stood, it might be that he wished to have a new framed store instead of the old one, and it would be within the region of possibility that he would not be so likely to take as good care of the old one as he would if it were a new one ; and he might honestly omit to state his desire to substitute a new store for the old. But such a suggestion of such an omission, although quite as likely to affect the risk, could not be a foundation sufficient to support a verdict avoiding the policy for concealment. It would, we think, be sufficient for the plaintiff to describe the property to be insured, as it then existed ; and if the defendants wished for more particular information, touching the risk to be assumed, and the motives, more or less strong, which would operate with the plaintiff in regard to the care he would take of the property assured, they should inquire.

This is the more equitable, because the law would require the plaintiff to take reasonable care of the property insured. He could not recover if it were proved that the fire was caused by his own fraud or neglect.

If the Chief Justice had left the cause to the jury with instructions to find for the defendants, if they should think there was a concealment material to the risk, and they had returned a verdict for the defendants upon that ground, we all think the verdict could not have been supported, upon the evidence produced. The fact is to be settled by the jury, but it must be upon legal and sufficient evidence ; and where the evidence is agreed, it is a question of law whether it be sufficient or not to establish the fact. Now the evidence is, that the plaintiff did not say whether he owned the land or not ; and it is not in our power to see how that varied the risk which the defendants assured against fire. It would have been just as material to

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have stated on which side, east or west, of the street the house stood ; whether it were painted or not. In the latter case it probably could be said with truth, that if painted it would be more combustible than if it were not. But such objections would be vain ; and it seems to the Court that those which are now made to the instruction of the Chief Justice, cannot be maintained. Enough was truly represented to put the defendants upon their inquiries for more. The case of *Curry v Commonwealth Ins. Co.* 10 Pick. 535, and cases to which we have been referred, seem to us clearly to show that the proceeding at the trial was correct, and that the judgment should be entered for the plaintiff, according to the verdict.

THEODORE LYMAN *versus* JONAS C. GIPSON.

Where a horse *damage feasant* in an enclosure was impounded by the owner of the land, and subsequently sold by auction in due form of law, for the indemnification of such owner, it was *held*, in an action of replevin brought by the original owner of the horse against the purchaser, that the declarations of the owner of the land, offered in evidence to show that the impounding was illegal, were not admissible, especially such as were made after the sale.

Where cattle break into a close, the owner of the close has a remedy under the process of distress, for damage done by the cattle to personal property therein.

Appraisers appointed to estimate the damage done by cattle distrained *damage feasant*, are not limited to the amount of damages claimed by the owner of the close in the notice of distress given by him to the owner of the cattle.

The owner of a close having impounded a horse doing damage therein, sent a notice to the owner of the horse containing these words : " I have taken up as an *stray*, doing damage in my enclosure, a horse belonging to you " ; " and my damages are six dollars." It was *held*, that a sale of the horse in the manner prescribed by statute, in the case of animals taken up *damage feasant*, was nevertheless valid, the word *stray* not being used technically, in such notice.

Under *St. 1785, c. 65, § 3*, [*Revised Stat. c. 113, § 4*] providing, that any person injured by cattle in his lands " that are inclosed with a legal and sufficient fence," may maintain trespass against the owner of the cattle, or distrain them, it was *held*, that where cattle unlawfully going at large in a highway broke into a close adjoining thereto, the owner of the land was entitled to such remedies, although the land were not enclosed with a sufficient fence, against the highway, he not being bound to fence against cattle unlawfully at large in the highway.

REPLEVIN for a stud-horse. The trial was before *Putnam J.*, upon the issue of property in the plaintiff.

The defendant admitted that the horse originally belonged to the plaintiff ; but claimed title in himself under a sale by auc-

tion made by Lewis Bemis, who had taken the horse *damage feasant*.

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It appeared, that Bemis kept a mare within an enclosure adjoining a highway in Waltham ; that about daylight on the morning of May 31st, 1833, Bemis called to his hired men to go out and secure the plaintiff's horse, which he said was with his mare in the enclosure ; that when the first of the men got out of the door into the enclosure, the gate was open, the top bar being cracked but not removed ; that the horse and mare were together within the enclosure near the gate, and going towards it ; and that when Bemis came out of the house, the horse was in the highway, where they secured him and impounded him in Bemis's barn.

The plaintiff proved, that Bemis had said, that when he first saw the horse, on the morning in question, he was in the highway. The plaintiff thereupon contended, that the distress thus made was unlawful, as being made in the highway. But this objection was overruled, for the sake of proceeding in the trial.

On the same day the following notice was sent by Bemis to the plaintiff: " I hereby notify you, that I have taken up as an *estray* doing damage in my enclosure, a grey stud-horse *belonging to you* ; said horse broke down the gate and fence, and went into my ground and damaged my mare ; and I have the said horse impounded, under my immediate care and inspection, in my barn at Waltham, and my damages are six dollars. Said horse I impounded on the morning of the 31st of May, 1833."

A warrant was issued by the town clerk of Waltham to certain persons, requiring them to ascertain and estimate the damage done by the horse, and also to appraise the value of the horse ; and the appraisers, in their return, estimated the damages at the sum of \$ 16.25, and appraised the horse impounded at the sum of \$ 30. The damages not having been paid, the horse was sold by auction in due form of law, to the defendant, for the sum of \$ 62.

The plaintiff then offered to prove by the testimony of one of the appraisers, that in estimating the damages they took into consideration the injury done by the horse to the mare, which constituted a large part of such damages. The defendant ob-

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jected to the admission of this evidence ; but this objection was also overruled, for the purposes of the trial.

The plaintiff also offered to prove, that since this action was commenced, Bemis had declared to a hired man of the plaintiff, that the horse was in the highway when he first saw him on the morning in question. The defendant objected to this evidence ; but it was admitted by the judge.

The defendant contended, that under the circumstances of the case, the burthen of proof was on the plaintiff, to satisfy the jury that the gate was broken or opened by some other agency than that of the horse ; and that if the plaintiff did not remove their doubts on this point, they ought to find for the defendant.

The plaintiff, on the other hand, contended that the burthen of proof was on the defendant, to satisfy them that the horse actually broke or opened the gate ; and if he failed to remove their doubts on this point, they ought to find for the plaintiff.

This point was ruled by the judge in favor of the plaintiff.

The only question submitted to the jury to decide, was, whether the defendant had satisfied them that the gate was shut, or, in other words, whether the land of Bemis, at the time, was enclosed by a legal and sufficient fence or not.

The jury returned a verdict for the plaintiff.

The jury stated, on being inquired of by the judge, that it was not proved to their satisfaction, that the land was enclosed by a legal and sufficient fence.

The verdict was taken subject to the opinion of the whole Court upon the points of law raised at the trial.

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Greenleaf, for the defendant. The declarations of Bemis were inadmissible in evidence. He is not a party to the action, nor, in one sense, grantor to the defendant, and could have been a witness for either party. He is not liable to the defendant ; for there was no warranty on his part, express or implied, he not having sold the horse as his own property. 2 Kent's Comm. 478. At any rate the declarations made by Bemis after the sale to the defendant, should have been excluded. If the declarations made after the sale were improperly admitted, the plaintiff cannot say, that they had no bearing, if by any possibility they might have affected the verdict. In the present

case it is very probable that they did influence the jury. *Ap-pleton v. Boyd*, 7 Mass. R. 131 ; *Richardson v. Field*, 6 Greenl. 303 ; *Haven v. Brown*, 7 Greenl. 421 ; *Woodman v. Coolbroth*, 7 Greenl. 191 ; 1 Stark. on Evid. 390.

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Bemis had a right to impound the horse, under the circumstances. *Clement v. Milner*, 3 Esp. R. 95.

The testimony of one of the appraisers in regard to the estimate of damages was incompetent. The return is conclusive evidence of all the facts it contains ; and the admission of evidence to contradict it would lead to confusion, and to frauds on innocent purchasers, and would be against public policy. 2 Stark. on Evid. 729 ; 3 Stark. on Evid. 1044 ; *Ladd v. Blunt*, 4 Mass. R. 402 ; *Wellington v. Gale*, 13 Mass. R. 483 ; *Boody v. York*, 8 Greenl. 272.

Hoar, for the plaintiff, to the point, that Bemis had no right to impound the horse, cited *Brownlow v. Lambert*, Cro. Eliz. 716 ; that the notice to the plaintiff was insufficient, inasmuch as it set forth, that the horse was taken up as an estray, instead of stating simply that he was taken up in Bemis's enclosure, *damage feasant*, the provisions of the St. 1788, c. 65, being different in the two cases, Jacob's Law Dict. *verb. Estray* ; 1 Bl. Com. 297.

SHAW C. J. delivered the opinion of the Court. The Court are of opinion, that it was not competent for the plaintiff to give in evidence the statements of declarations of Bemis, especially those made after the sale ; and for this cause a new trial must be granted. As several other points were made, a decision of which may be important, should another trial be had, we have taken them into consideration.

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It was objected to the regularity of the proceedings under the distress, that the appraisers took into consideration, damage done to personal property ; and this gave rise to some incidental questions as to the mode of proving the fact, if admissible, by the testimony of the appraisers.

As in an action of trespass *quare clausum* such damage could be recovered by way of aggravation, and as the statute of replevin gives the like remedy by distress *damage feasant*, for a trespass, the remedy must be deemed co-extensive, as to

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the nature and amount of the damage to be recovered *St* 1788, c. 65, § 3.

Another objection was, that damage was awarded by the appraisers beyond the amount, of which the distrainer, Bemis, had given the plaintiff notice. Had the plaintiff tendered the amount thus stated and the expenses, Bemis would have been bound by it, and must have surrendered the horse. But as he did not tender this, or any other sum, and Bemis was obliged to have an appraisal, he was not limited to the damage claimed in his notice. There is very little analogy between this and the *ad damnum* in a writ. It is more like an offer or demand *in pais*, which, if not acceded to, the party is not bound by, in ulterior legal proceedings.

It was also insisted, that Bemis himself, in his notice to Lyman, stated that he had taken up the horse as *an estray*, and was, therefore, required by the statute to adopt another and a different course, and, consequently, that his proceeding was irregular and erroneous, and the sale to the defendant void.

An estray technically and as understood in the statute, is an animal of which the owner is unknown. In this case, Bemis addressed a note to Lyman, saying, "I have taken up as an estray doing damage in my enclosure, a grey stud-horse *belonging to you*." This shows clearly that he did not use the word "estrays" technically, but did in fact know the owner of the horse, and professed to have taken him *damage feasant*.

But perhaps the most material point in the present case is this, whether the party distraining, Bemis, could take up and impound the plaintiff's horse, without showing that his own close was secured by a legal and sufficient fence, and under this head showing also, that his fence was up and his gate closed, at the time the horse broke into his enclosure.

The provision of *St*. 1788, c. 65, § 3, is, that any person injured &c. in his lands enclosed with a legal and sufficient fence, may have an action of trespass against the owner, or may impound the cattle or horses, &c.

The words here used, "enclosed with a legal and sufficient fence," applying, as they do, to a great variety of cases and circumstances, must be taken distributively, and must be understood to mean, so enclosed, when by law a fence is neces-

sary. But it has been often decided, that an owner is not bound to fence against a highway, against cattle or other animals unlawfully going at large in the highway, and therefore, without having any sufficient fence against the highway, if animals going at large unlawfully break into his close, he may have his remedy by distress ; and the same rule applies to trespass *quare clausum*. *Melody v. Reab*, 4 Mass. R. 471 ; *Rust v. Low*, 6 Mass. R. 90 ; *Stackpole v. Healy*, 16 Mass. R. 33. By the statute which was in force when this transaction took place, St. 1788, c. 44, horses were prohibited from going at large in the highways, except under certain restrictions ; and by the second section, every ungelded horse, of which the horse in question was one, was absolutely prohibited from going at large, under a penalty. We think, therefore, that whether Bemis had a sufficient fence against the highway or not, he had a right to distrain the horse, found *damage feasant* in his close ; and whether his gate was closed or not, was not a fact material to his right to distrain.

Verdict set aside, and new trial granted

JOHN K. SIMPSON *versus* AMASA M'FARLAND.

In replevin, the plea of *non cepit*, although it admits the property to be in the plaintiff, may nevertheless be joined with a plea of property in the defendant or another person.

Certain chattels which had been transferred by the defendant to the plaintiff by a deed of mortgage not duly recorded, were attached by an officer on a writ against the defendant in favor of one of his creditors. In replevin for the chattels, brought by the plaintiff against the defendant, it was *held*, that the plaintiff was not entitled to judgment, because there was no wrongful taking or detention by the defendant, but that the defendant was not entitled to a return, because, as against him, the plaintiff had a right to the chattels, although the mortgage was not recorded, and the defendant was not accountable for them to the officer or the creditor.

REPLEVIN for articles of household furniture. The writ bears date of March 15th, 1834.

The defendant pleads *non cepit* ; upon which issue is joined

Under this issue, the plaintiff produced in evidence a deed of mortgage, dated November 13th, 1832, and recorded in the

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city clerk's office in Boston on December 3d, 1832, and in the town clerk's office in Cambridge on July 29th, 1833, by which deed the defendant conveyed to the plaintiff the articles of furniture named in the writ, to secure the payment of \$667.53, in four semi-annual payments. The plaintiff then introduced as a witness one Stocker; who testified, that a day or two prior to the date of the writ, he went, by the plaintiff's direction, to Cambridge, where the defendant then lived, and demanded the property described in the mortgage, and the defendant thereupon pointed out to him all the articles named in the writ, except a few pieces of crockery ware which had been broken, and made no objection to the plaintiff's taking possession of the property; but the witness was prevented from taking possession, by one Richardson, who was present. The plaintiff also read in evidence a letter, dated the 11th of November, 1834, written by the defendant to the plaintiff, in which he says that he shall make no defence in this suit, but that he does not restrict his bail from doing as he shall think best.

2. The defendant also pleads, that on the 26th of July, 1833, he was possessed of the goods and owned them; that on that day, one Livermore caused them to be attached by one Edwards, a deputy sheriff, in a suit against this defendant; that Livermore obtained judgment at March term, 1834, of the Common Pleas in this county, for \$401.60, which judgment is still in full force and unsatisfied, and these goods, at the time of the commencement of the present action, were held by Edwards, in virtue of his attachment. The plaintiff, in his replication, alleges that the goods were, on the 26th of July, 1833, and ever since have been, his property, and traverses the defendant's allegation that on that day they belonged to the defendant; and issue is joined upon this traverse.

3. The defendant's third plea is like the second, substantially, except that it states that the goods were in the custody of Richardson as the servant of Edwards, having been delivered by Edwards to Richardson to be kept by virtue of the attachment. The replication and issue on this plea are similar to those on the second.

4. In the fourth plea the defendant says, that the goods, at

the time of the supposed taking, were the property of Richardson, traversing that they were the property of the plaintiff. The plaintiff, in his replication, reaffirms that the goods were his property, and issue is taken thereon.

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The plaintiff relied upon the mortgage to support these three last issues, on his part. The defendant proved that he lived in Cambridge on the 3d of December, 1832, the time when his mortgage was recorded in Boston, and continued to live there until the commencement of this suit. It also appeared, that on the 12th of August, 1833, while the goods were held by Edwards under the attachment, he appointed Richardson keeper of them, and Richardson, by a writing under his hand and seal, of that date, "promised to keep said goods safely, at his risk and expense, and redeliver the same to said Edwards, &c. on demand, and in failure thereof, promised to indemnify said Edwards," &c. On the same day Richardson appointed H. Corbet and J. Adams keepers of the goods, under him. The goods remained in the house in Cambridge occupied by the defendant, and were used by him after, as they had been before the attachment, until they were taken by the plaintiff on his writ of replevin. The defendant gave up the lease which he had of the house before the attachment, from Richardson the owner, who then made an oral lease to Corbet.

Morton J., before whom the cause was tried, being of opinion that the plaintiff was not entitled to recover, a nonsuit was entered, subject to the opinion of the whole Court.

Farley and *Bultrick*, for the plaintiff.

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Mellen, contra, cited to the point, that the defendant was entitled to a return, *Quincy v. Hall*, 1 Pick. 357 ; 1 Wms's Saund. 195 c, note.

MORTON J. delivered the opinion of the Court. The case was substantially tried on the plea of *non cepit*. And we are clear in the opinion, that there was not evidence enough to support the action on this plea. The plaintiff, to maintain this issue on his part, must prove either an *unlawful taking* or an *unlawful detention*. *Badger v. Phinney*, 15 Mass. R. 359 ; *Baker v. Fales*, 16 Mass. R. 147 ; *Marston v. Baldwin*, 17 Mass. R. 606.

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It is not pretended that the defendant *wrongfully took* the

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goods from the plaintiff. The plaintiff had formerly sold and delivered them to the defendant, and never afterwards, and before the service of this writ, had or claimed possession. Nor is there any better ground for maintaining that the defendant *wrongfully obtained* them. He showed them to the plaintiff, and made no objection to his taking them. They had been attached at the suit of a creditor of the defendant; the legal possession was in Edwards, the officer; and the actual custody in his servant Richardson, the receiptor.

The letter which the plaintiff relies upon cannot avail him. If it contained a clear confession of the defendant, which it does not, it would not control the facts fully proved by the testimony of the plaintiff's own unquestioned witness. It is very manifest that here was neither a *taking* nor a *detention*; and the nonsuit must therefore stand.

But now arises the more difficult question, whether the defendant is entitled to a return. The plea of *non cepit* admits the property to be in the plaintiff; and, of course, on that plea the defendant cannot have judgment for a return. "On the plea of *non cepit* he cannot have a return." *Holmes v. Wood*, 6 Mass. R. 1; 1 Wms's Saund. 347, note 1. In England, the defendant can never have a return, unless he plead property in himself or another, or make avowry or conusance. *Wildman v. North*, 2 Lev. 92; *Butcher v. Porter*, 1 Salk. 94; Pul. N. P. 54. But in this State we have relaxed the strictness of the English form of pleading in replevin, as well as in other cases. And avowries are less frequently resorted to now than formerly. *Quincy v. Hall*, 1 Pick. 361. But the general principle is the same here and in England. Whenever upon the pleadings it appears that the defendant is entitled to a return, he will have judgment for it; otherwise he will not. Thus on a plea in abatement, when the defendant prevails, but no facts are stated in the plea or suggested on the record, showing that he has a right to the possession, he cannot have a return. *Gould v. Barnard*, 3 Mass. R. 199. But if the plea in abatement shows that the plaintiff is not entitled to hold possession, the court, in rendering judgment, will award a return. Thus when the defendant, in his plea, alleges property in himself or a stranger, he is entitled to be restored to the posses-

sion, either because the property is in him or because he is accountable for it to the true owner. *Salkold v. Skelton*, Cro. Jac. 519; *Presgrave v. Saunders*, 2 Ld. Raym. 984. And although it may appear that at the time to which the pleas must refer, viz. that of the service of the replevin, the property was in the defendant, and he was then entitled to the possession, yet if it also appear that by subsequent events and before the rendition of judgment, his right has ceased, he cannot have judgment for a return. Buller (N. P. 54) referring to *Danville*, 652, says, "where by matter subsequent he is not to have the thing for which the distress was taken, there he will not be entitled to a return." And in *Wheeler v. Train*, 4 Pick. 168, where it appeared at the time of the trial that the plaintiff was not entitled to recover because the chattels were under lease, and the lessee's interest had been attached by the defendant, but before judgment was rendered the plaintiff became entitled to the possession by the expiration of the lease, the Court rendered judgment for the defendant, but refused to award a return. It would have been not only useless, but unjust, to have restored the chattels to the defendant, as the plaintiff might have recovered them back immediately, the attachable interest of the lessee having expired.

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We have already shown, that on the plea of *non cepit* the defendant is not entitled to a return. If he can claim it at all, it must be upon some of his special pleas. This renders it necessary briefly to examine them.

In the first special plea, the defendant alleges that the goods were his property, that Edwards, a deputy sheriff, attached them at the suit of one of his creditors, who recovered a judgment which had not been satisfied, and that the goods were sold by Edwards by virtue of the attachment.

The second special plea is the same as the first, except that instead of alleging that the goods were held by Edwards, it alleges that they "were in the custody and keeping of one Richardson as the servant of said Edwards, and to whom said goods had been delivered by said Edwards to be kept, in and by virtue of said attachment."

The third special plea alleges, that the property was in Richardson, and not in the plaintiff.

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To all these pleas, the plaintiff, denying that the property and possession are as stated, reaffirms that the property is in himself; upon which issue is joined.

The first question which has been raised and argued upon these pleadings is, whether they are not so inconsistent and repugnant as by the rules of double pleading to be inadmissible. There certainly seems to be some absurdity in trying, in the same case, pleas so contradictory and irreconcilable as some of these seem to be. For if the defendant never took the goods, what does it matter whose they are? He certainly cannot claim to have the possession of them. But it is not easy to say how far in inconsistency double pleas may go, or what pleas which may be tried by the same forum, may be deemed so repugnant as not to be allowed to be pleaded together. In Comyns's Digest, *Pleader*, E 2, many instances of double pleading are cited where the pleas are quite as inconsistent as these. And it is there said, and also in Barnes, 364, that in replevin, *non cepit*, property in another, and *liberum tenementum* are allowed. This seems to support this mode of pleading. But if the special pleas are admissible, and we are inclined to think they are, they will not change the aspect of the case.

Although the facts are not brought before us and spread on the record, by a special verdict, as in *Wheeler v. Train*, yet we have them in a form not less authentic. Facts reported by the judge who tried the cause, are not of less verity or less within our cognizance, for many purposes, than if they were brought before us by a special plea or verdict. From the report in this case, it is perfectly clear that the plaintiff cannot support his action, and not less clear that the defendant has no right to the possession of the goods.

As against the defendant the plaintiff manifestly had a right to the possession. His mortgage, though by reason of its not having been recorded in the town where the mortgager resided, it would not avail him against a *bonâ fide* sale by the mortgager or an attachment by a creditor of the mortgager, yet, as between the parties, was valid. St. 1832, c 15. See also Revised Stat. c. 74, § 5. The condition was broken; the plaintiff had a right to take possession under it, and of this the defendant could not complain. There is no ground upon which

the Court could *restore*, or, more correctly speaking, *transfer* Simpson
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the goods to the defendant. He is not entitled to possession as general owner, against the mortgagee ; he has no special property in them ; and he stands in no such relation to the officer or creditor, as to render him accountable to either of them.

Furthermore, should we award a return, it would not exempt the plaintiff from his liability to Edwards. The writ of replevin would not justify the plaintiff in taking the goods from Edwards, who had the legal possession and the actual custody, by his servant. This was a trespass, for which he will be liable, whether we order a return or not.

But if we disregard the facts reported, and look only to the pleadings, the defendant's claim of a return cannot be supported. The plea of property in the receiptor most obviously must fail ; for he had neither property nor possession. *Commonwealth v. Morse*, 14 Mass. R. 217. The two other special pleas, after setting forth by way of inducement, a general property in the defendant, allege a special property in Edwards. The evidence would undoubtedly support these issues on the part of the defendant ; for the mortgage was of no avail against this attachment. At the time to which the pleas refer, the time the goods were replevied, the officer had a lien upon them which entitled him to hold possession. But the pleas also show facts from which it appears, that, at the trial, the attachment was dissolved by lapse of time. So that though the officer might seize the goods on an execution, if he had one, and could find them, yet he could not hold them by virtue of his original attachment. Therefore, by the authority of *Wheeler v. Train*, upon the facts shown in the pleas, there is no ground for a return.

We feel the greater satisfaction in following out the legal principles to this result, because it makes the nearest practical approximation to exact justice between the parties. While the plaintiff should have the greatest benefit which he can derive from his mortgage, without infringing the rights of innocent parties, the consequences of his own negligence should fall on himself, rather than on the more careful and vigilant creditors, who attached the goods before his mortgage was legally recorded. And while he will hold the property, he will be liable

Simpson to a suit by the attaching officer, in which the measure of
v. damages will be the amount of the creditor's claim, leaving the
McFarland. balance to pay the plaintiff's demand as far as it will go. *Boyd*
v. Moore, 11 Pick. 362.

Judgment for defendant for costs, but no return.

COMMONWEALTH *versus* LEANDER RICHARDS.

The 12th article of the Declaration of Rights, which provides, that in criminal cases, the accused shall have the right "to meet the witnesses against him, face to face," is not violated by the admission of testimony in a criminal trial before a jury, to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace.

It is not sufficient, in such case, to prove the substance and effect merely of the testimony of the deceased witness, although the memory of the witness offered to prove such testimony, be aided by notes taken at the preliminary examination; but the whole of the testimony of the deceased witness upon the point in question, and the precise words used by him, must be proved.

THIS was an indictment against the defendant for perjury. The offence was alleged to have been committed at the examination of Ebenezer D. Richards, on a complaint made against him for forging the name of Solomon Hopkins.

The defendant pleaded not guilty.

At the trial, in the Court of Common Pleas, before *Strong, J.*, it appeared, that Hopkins, who was duly sworn as a witness, at the preliminary examination of the present defendant, before a justice of the peace, had since deceased.

Josiah Adams and Omen S. Keith were called as witnesses, and were permitted to testify as to the testimony of Hopkins at the examination of the defendant before the magistrate. These witnesses did not state the exact words used by Hopkins, but only the substance of them, from recollection, aided by notes taken at the time. Keith testified, that he was confident that he stated the substantives and verbs correctly, but was not certain as to the prepositions and conjunctions.

To the admission of this testimony the defendant objected, for the following reasons:

1. Because it was mere hearsay testimony, and consisted wholly of the declarations of another.

2. Because the testimony of Hopkins was given on the trial of another and different issue from the one then about to be submitted to the jury.

3. Because Adams and Keith could not, and did not, pretend to give in evidence the words used by Hopkins at the examination, but only what they believed to be the substance and purport thereof.

4. Because the testimony of Hopkins was given at the examination of the defendant before a justice of the peace, where the defendant had not, and could not have, an opportunity to cross-examine the witness and to apply the usual tests for eliciting the truth.

These objections were overruled ; and the jury having found a verdict of guilty, the defendant excepted to the ruling of the court.

W. Brigham, for the defendant. The admission of the testimony of Adams and Keith, was in violation of the 12th article of the Declaration of Rights, which provides that in criminal cases, the subject shall have the right to meet the witnesses against him, face to face. The objects of this provision are : 1. to prevent any mistake as to the identity of the person accused ; 2. to deter the witness from testifying falsely, by the presence of the accused ; and 3. to give the jurors an opportunity to see the effect of the meeting of the accused and the witness. It is not sufficient that such a meeting takes place at a preliminary examination of the accused before a magistrate, but they must meet face to face before the court and jury. *State v. Atkins*, 1 Overton, 229.

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In the present case, the witnesses stated merely the substance of the words used by the deceased witness, but not the words themselves ; and their testimony is, therefore, inadmissible. *Le Baron v. Crombie*, 14 Mass. R. 234 ; *Melvin v. Whiting*, 7 Pick. 79 ; *Doncaster v. Day*, 3 Taunt. 262 ; Saund. Pl. & Evid. 555 ; Phil. on Evid. (N. York ed. 1820) 199 ; *Rex v. Jolliffe*, 4 T. R. 290 ; *Wilbur v. Selden*, 6 Cowen, 162 ; *Jackson v. Woolsey*, 11 Johns. R. 446 ; *Lightner v. Wike*, 4 Serg. & Rawle, 203 ; *Wolf v. Wyeth*, 11 Serg. & Rawle, 149 ; *Peake's Evid.* 60 ; *Fenwick's case*, 5 State Trials (Hargr. ed.) 64 ; *Pyke v. Crouch*, 1 Ld. Raym. 730 ; *Finn v. Com-*

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monwealth, 5 Randolph, 708 ; *State v. Atkins*, 1 Overton, 229 ; *Crary v. Sprague*, 12 Wendell, 45. This species of evidence has never been held admissible in criminal cases. It is admissible only where the witness is dead, and the parties and the issue continue to be the same. Here there was no preceding trial. The justice had no authority to try the defendant, but only to bind him over to a higher tribunal. At such preliminary examinations there is not a full investigation of the circumstances ; and the accused is not prepared to cross-examine. Besides, in the present case, the deceased witness was the accuser ; for it was his name that was alleged to have been forged. *Jackson v. Winchester*, 4 Dallas, 206 ; *Jessup v. Cook*, 1 Halsted, 434.

The inconvenience of admitting this kind of evidence is very striking. In England, the very *words* of the deceased witness must be given ; and this shows the absurdity of admitting such evidence ; for the countenance of a witness, and his manner of testifying, have a very important bearing in weighing the truth of his testimony.

Austin (Attorney-General) for the Commonwealth, to the point, that it was a well established general rule, that the testimony of a deceased witness on a former trial may be given in evidence in criminal as well as civil cases, cited *Ruckworth's case*, T. Raymond, 170 ; *Coker v. Farewell*, 2 P. Wms. 563 ; *Pyke v. Crouch*, 1 Ld. Raym. 730 ; *Doncaster v. Day*, 3 Taunt. 262 ; *Le Baron v. Crombie*, 14 Mass. R. 234 ; *United States v. Wood*, 3 Wash. C. C. R. 440 ; *Jackson v. Lawson*, 15 Johns. R. 544 ; Buller's N. P. 242 ; *Bromwich's case*, 1 Levinz, 180 ; that it is not necessary, that the exact words used by the deceased witness should be proved, and that the court may exercise its discretion as to the admission of such testimony, *Melvin v. Whiting*, 7 Pick. 79 ; and that the examination before the magistrate and the trial before the jury, are to be deemed the same action, *Jackson v. Lawson*, 15 Johns. R. 234.

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PUTNAM J. delivered the opinion of the Court. The question is, whether the testimony of Messrs. Adams and Keil., of what S. Hopkins swore to before the magistrate upon the examination of the defendant, on the charge of perjury, is competent evidence.

It has been contended for the defendant, that the admission of such evidence is directly against the 12th article of the bill of rights, which provides, that in criminal cases the subject shall have a right "*to meet the witness against him, face to face.*"

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Now the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. Was it competent for the witnesses, who testified at the trial in the Court of Common Pleas, in the presence of the prisoner, to state what Hopkins, who is now deceased, did swear to before the magistrate in the presence of the prisoner? We do not think that the case falls within the constitutional objection. That provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law. In trials for murder, for example, the dying declarations of the party as to the fact of having received the death-wound from the party accused and the circumstances attending, have been proved by persons who were present and heard and could make oath to such declarations. They are not considered as hearsay evidence, for being made under the apprehension of immediate death, they are justly supposed to be entitled to all the credit which would be given to them, if the declarant made them upon oath. Such declarations, made when the accused was not present, are admissible evidence; Peake's Evid. 60; *Rex v. Radbourne*, Leach, 512; and were not intended to be excluded or touched by the provision cited from the bill of rights.

We think it to be very clear, that testimony of what a deceased witness did testify on a former trial between the same parties on the same issue, is competent evidence. The rule is thus well stated in 2 Lilly's Abr. 745. "If one who gave evidence on a former trial, be dead, then, upon proof of his death, any person who heard him give evidence and observed it, shall be admitted to give *the same evidence* as the deceased witness gave, provided it were between the same parties." I cite the passage for the expression "shall be permitted to give

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the *same evidence*," which the deceased gave. It is to be the same, not a part, not the effect or substance, but the whole evidence which the deceased witness gave, touching the matter or issue in controversy. 1 Phil. Evid. c.7, § 7; *Miles v. O'Hara*, 4 Binney, 111; *Pyke v. Crouch*, 1 Ld. Raym. 730; *Melvin v. Whiting*, 7 Pick. 79; Bull. N. P. 242, *et seq.* In *Finn v. Commonwealth*, 5 Randolph, 708, the court confined this rule of evidence to *civil* causes: "we cannot find the rule has ever been allowed in a *criminal case*." But the rules of evidence in civil and in criminal cases are generally the same. And this rule was recognized in the information against *Buckworth*, T. Raymond, 170, for perjury in a case of ejectment. The defendants pleaded not guilty; and to prove the perjury, a witness was produced to prove what one, who had since died, swore upon the first trial. *Keyling* C. J. would not allow it, because the former trial was betwixt other parties. *Twisden and Morton*, *contra*, and it was allowed. Now *Keyling* did not contend, that such evidence was not competent, if it were between the same parties. *Vid. S. C.* 1 Sid. 377, where the particular evidence given by the defendant, is set forth.

It is stated in Gilb. Evid. 889, that exceptions to the rules as to hearsay evidence applicable to ancient customs, do not apply to criminal cases. But in the case of the *United States v. Wood*, 3 Wash. C. C. R. 440, for robbing the mail, such evidence is held to be admissible. Bache was allowed to testify what Hare swore to at a former trial; but he could not do it. He could swear to what he thought was the substance and effect of it. He was allowed to refresh his recollection by reference to the minutes which he had taken at the time; but he was rejected, because he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them as the witness uttered them. Now this was right; for unless he could give the words, how can it be said to be the same evidence that the deceased witness gave? It is the mere inference; but the jury should draw the inference from the words which the deceased witness used. So in *Res v. Jolliffe*, 4 T. R. 290, a witness was called to prove what Lord Palmerston had sworn to at a former trial, and was rejected, because he would not undertake to give the very words, but merely their effect, or substance.

But the whole of what the deceased witness said should be proved. Some part which was said and not recollected, might certainly limit and qualify the meaning of the words which are recollected. Hence it is, that persons who are in hearing, who are favorably inclined to one party, may recollect a particular expression, which conformed to their wishes, and wholly omit the words of qualification ; while others, who incline towards the other side, will remember the words of qualification and forget or take no notice of the particular expression. We see this exemplified very frequently in trials before juries. How common it is, for the counsel engaged in the cause to disagree as to what the witness has sworn to, recently. One notes down upon paper or treasures up in his mind, what he considers to be favorable, and disregards the rest, while the other recollects the rest with great clearness. And it is not unusual that the court understood the witness to state the matter differently from what the counsel on either side suppose was the evidence.

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The difficulty is increased by the length of time which has elapsed between the time when the testimony of the deceased witness was given, and the statement of it by the living witness who heard it.

To be worth any thing the whole of what the deceased witness said upon the matter should be stated ; and if you get the whole, it is very defective ; for you cannot have a true representation of the countenance, manner and expression of the deceased witness, which either confirmed or denied the truth of the testimony. The false witness cannot endure the stings of his wounded conscience, his countenance and his deportment will, in spite of his endeavours to the contrary, by signs as clear and intelligible as they are inexpressible, declare, that the story which he has just sworn to, is a lie.

These considerations induce us to require full proof of all that the deceased witness swore to. His words, and not the synonymous words of him who states his testimony, are to be recited. In *Wilbur v. Selwin*, 6 Cowen, 162, the court held, that the words of the deceased witness should be given, and not the substance of them. It is true, that this strictness will generally exclude such testimony ; for if the evidence of a de-

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ceased witness was minute and protracted and related to a transaction which was of a complicated character, it would seem to be almost incredible that any person could with certainty recite it. If he undertook to do it, it is very likely he would lose as much in credit, as he should assume in positiveness. If the evidence related to a single fact, for example, whether the witness did or did not see A. B. sign such a note, the answer might well be recollected.

To apply this reasoning and the authorities which are cited at the bar, to the case under consideration, we think it to be very clear, that there was not legal and sufficient evidence given by Mr. Adams or by Mr. Keith, of what Hopkins, the deceased witness, swore to. They say they cannot give the exact words, but their substance from recollection aided by notes of his testimony taken at the trial. And this sort of evidence was rejected by the Circuit Court of the United States in the case of the *United States v. Wood*, before cited. The case at bar is not certainly more favorable for the government than that was.

The result follows, that the verdict must be set aside, and a new trial be had at the bar of the Court of Common Pleas for this county.

ABEL B. JONES *versus* CALVIN RICE.

A promissory note given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration.

ASSUMPSIT on a promissory note, dated January 1st, 1835, made by the defendant to the plaintiff, for \$ 147.

At the trial, before *Shaw* C. J., it appeared that on the night of December 31st, 1834, a ball was given at the house of Joel Jones, in Sudbury ; that an attempt was made by the defendant and others, to interrupt the ball by violence ; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball ; that a complaint was filed before a justice of the peace and a warrant issued by him against some of the rioters ; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to

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the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of \$184; that of this amount the sum of \$40 was for damages sustained by three individuals, \$10 for the services of the officer, and \$2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted by those assembled at the ball, that if the accused would pay the sum proposed or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms and paid about \$40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party"; and that in consequence of this arrangement the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The Chief Justice was of opinion, that the plaintiff was not entitled to recover, because the evidence proved a want of consideration or a bad consideration for the note; and the plaintiff consented to a nonsuit, subject to the opinion of the whole Court.

Hoar, for the plaintiff, did not contend that a promise made for the purpose of compounding a criminal prosecution, is founded on a good consideration, although it had been so held in England where the offence was under a felony, but he relied on the point, that the plaintiff might have maintained a civil action for the injury sustained by him and had a right to compromise such action, and that such right was not affected by the circumstance that an offence against the public had been committed at the same time. *Collins v. Blantern*, 2 Wils. 341; *Edgcombe v. Rodd*, 5 East, 294; 1 Chitty on Criminal Law, 4; *Harrison v. Parker*, 6 East, 158; *Drage v. Ibberson*, 2 Esp. R. 643; *Fallowes v. Taylor*, 7 T. R. 475; *Johnson v. Ogilby*, 3 P. Wms. 276; *Petersdorf's Abr. Compounding*; 4 Bl. Comm. 136.

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S. H. Mann, for the defendant, cited *Collins v. Blantern*, 2 Wils. 341; *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt. 422; 4 Bl. Comm. 363.

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PUTNAM J. delivered the opinion of the Court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of \$52 was given for the damages and expenses, and \$132 for the compounding of the misdemeanor ; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful ; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Ibberson*, 2 Esp. R. 643, Lord *Kenyon* held, that the consideration for settling a misdemeanor was good in law. And the case of *Fallowes v. Taylor*, 7 T. R. 745, proceeds upon the same principle. It was there held by Lord *Kenyon* and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions and who was directed to prosecute the defendant for a public nuisance,) conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think, that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice ; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russell on Crimes, 210 ; *Edgcombe v. Rodd*, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use, money which properly should be levied as a fine upon the criminal party for the use of the Commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note

to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined ; but whether more or less is altogether immaterial ; for no part of it belonged to the party. He might settle for his own damage from the riot ; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

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We are all of opinion, that the nonsuit must stand.

RUEL MORSE, Petitioner, &c.

A person, whose land was injured by the construction of a rail road through it, applied to the county commissioners to assess the damages ; and the commissioners reported, that, it being understood and agreed by them, that the rail road corporation should construct a culvert, wasteway, &c. for his benefit, they had assessed the damages at the sum of \$ 500. Upon the acceptance of this report, the land owner applied for a jury, and obtained a verdict for the sum of \$ 600 ; but no reference was made in the verdict to the construction of a culvert, &c. The commissioners, thereupon, after hearing the parties, rendered judgment in favor of the land owner for the amount of the verdict, *but without costs*, on the ground that he had not obtained an increase of damages. It was *held*, that that part of the award of the commissioners relating to the construction of a culvert was not absolutely void, but might be rendered binding on the parties by ratification ; and that the refusal of costs to the land owner, was not such a disregard of a plain duty, on the part of the commissioners, as would justify this Court in interfering by a writ of *mandamus*.

PETITION for a *mandamus* to the county commissioners of this county.

It appeared, that the petitioner, being seised of certain land in Natick (together with a mill), over and through which the Boston and Worcester rail road was laid out and constructed, applied to the county commissioners, at their session in January, 1834, to assess the damages sustained by him thereby ; that in March, 1834, the commissioners reported, that "it being understood and agreed by them, that" the rail road corporation "shall construct and forever keep in repair a sufficient culvert to convey the water of the petitioner's mill pond from the north to the south side of said rail road, a good and sufficient wasteway, for the surplus water of said pond to pass

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off," &c., they estimated the damages sustained by the petitioner at the sum of \$ 500 ; that this report was accepted at a meeting of the commissioners in September, 1834 ; that the petitioner thereupon, considering that the sum so assessed was less than he was entitled to receive, made application to the commissioners for a jury to assess the damages ; that a jury was accordingly empanelled on April 2d, 1835, who assessed the damages at the sum of \$ 600 ; that in June, 1835, the verdict of the jury was duly returned into the Common Pleas, and accepted by that court ; and that in September, 1835, the verdict and the adjudication of that court were certified to the commissioners, and it was thereupon considered by them, that the petitioner should recover of the rail road corporation the sum of \$ 600, *without costs*.

In October, 1835, the petitioner presented his petition to this Court, praying for a rule on the commissioners to show cause why a writ of *mandamus* should not issue, commanding them to render judgment in the premises for the petitioner for the sum of \$ 600, and for his costs.

The commissioners having been accordingly ordered to show cause, returned " that they considered, that by law they had jurisdiction over the question of costs, and that it was matter within the judicial discretion of said commissioners, to allow or disallow costs to the said Morse upon said verdict ; and that upon a hearing of said parties upon the question of costs, it was the opinion of said commissioners, or a major part of them, that said Morse ought not to recover costs of the said corporation in his said suit, because they say, that the jury, in estimating the damages sustained by the said Morse, at the sum of \$ 600, unconnected and without the understanding and agreement of the parties mentioned in the return of said commissioners, made and accepted at their meeting, holden on the third Tuesday of September, 1834, to wit, that said corporation shall construct and forever keep in repair a sufficient culvert, &c., did not increase the damages as estimated by said commissioners at the sum of \$ 500, connected with said understanding and agreement ; and that accordingly they adjudged, that said Morse recover of the said Boston and Worcester Rail Road Corporation the said sum of \$ 600, the amount of the

verdict in his favor, without costs, as by law they had a right and were bound to do."

Peabody and *T. Bigelow*, for the petitioner. The commissioners, in refusing costs to the petitioner, arrogated to themselves discretionary powers not vested in them by law. *St.* 1831, c. 72, § 1, 7; *St.* 1786, c. 67, § 4.

The commissioners have no right to assess and award any thing but money, or to take notice of an agreement made by the parties. They can issue no process to enforce the performance of such agreement; and the petitioner can maintain no action on it, relying on the award. If such an agreement is included in their award, the award is so far extrajudicial and void.

The agreement in question is therefore not to be considered as part of the damages; and if so, the assessment of the jury exceeds that of the commissioners, and the petitioner is entitled to costs.

A writ of *mandamus* is the proper remedy for the petitioner. *Commonwealth v. Sessions of Hampden*, 2 Pick. 414; *Mendon v. County of Worcester*, 10 Pick. 235; *Rice v. Commissioners of Highways of Middlesex*, 13 Pick. 225.

Hoar and *Morey*, *contra*, as to the question of costs, cited *St.* 1786, c. 67, § 4; *St.* 1833, c. 187, § 1, 2, 3, 4; *Commonwealth v. Carpenter*, 3 Mass. R. 268; and to the point, that a writ of *mandamus* did not lie, *Chase v. Blackstone Canal Co.*, 10 Pick. 244; *Gray v. Bridge*, 11 Pick. 189.

SHAW C. J. delivered the opinion of the Court. [After stating the facts.] The petitioner now applies to this Court for a writ of *mandamus* to the county commissioners, requiring them to award him his costs, on the ground that having obtained an increase of damages, by the verdict of a jury, he is entitled to his costs, by virtue of the statute, and the commissioners had no judicial or discretionary power on the subject.

It was contended on the part of the respondents, that even if it should appear ever so manifestly, that the petitioner was entitled to costs, as of right, the Court would not grant a *mandamus* to the commissioners to award them; and the case of *Chase v. Blackstone Canal Co.*, 10 Pick. 244, was relied upon. In referring to that case, the Court are well satisfied

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that the decision was correct, although there is some generality in the language used in stating the opinion, which requires some qualification. It appears quite clear, that if the commissioners in that case had any authority to allow the petitioner his costs, it was a discretionary and judicial power, for them to exercise according to their judgment of the merits. The statute only gave costs to the respondent as a matter of right, where the party applying for a jury failed to increase or diminish the damages, and not where the party applying obtained an increase of damages. It was therefore a case in which the commissioners, being intrusted by law with the power of judging, the Court would not, by a writ of *mandamus*, require them to act contrary to their judgment. Most of the reasoning in the case and the authority cited from 3 Dallas, lead to this conclusion. And the result was, that the commissioners, having acted judicially in a matter properly submitted to their judgment, it was not a proper case for a *mandamus*. The expression requiring modification, is that in which it is intimated that where a court is imperatively required to allow costs, as incident to a judgment, a *mandamus* will in no case be granted, requiring such court to allow and tax them. But the rule is recognized, that a judicial tribunal may exercise ministerial functions, and in all such cases, a *mandamus* will be granted, when there is no other proper and adequate remedy. Cases may be supposed, in which such a remedy would be proper and warranted by analogy. Some instances are mentioned in the case cited, as where a judicial tribunal declines taking cognizance of a case within its proper jurisdiction. So if a court, having rendered a proper judgment, should refuse issuing an execution. And so where a judicial tribunal, having found all the facts necessary to a judgment, so that the judgment would be nothing but a conclusion of law upon these facts, the entering up of the proper judgment may be regarded as in its nature ministerial, and in the absence of any other remedy, may be a proper subject for a *mandamus*. Other cases, perhaps, might be suggested, where in consequence of great changes in the laws, and the erection of new tribunals with varied powers, this writ may be necessary, as the only adequate remedy to prevent failure of justice. I have thought it proper to say thus much

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in regard to the case of *Chase v. Blackstone Canal Co.*, lest the language alluded to might seem to put too great a restraint upon a high and beneficent power, intrusted by law to the judicial tribunals, to be exercised for the purposes of justice, when other remedies fail.

This cause has been fully and ably argued. The ground taken for the petitioner is, that the commissioners were bound to award the damages of the petitioner in cash only, and had no authority to prescribe other duties to be performed by the corporation for the petitioner ; and therefore, that all that part of the award which treated the performance of these duties as a part satisfaction of the petitioner's damages, was void ; that it stood as an award of \$ 500 only, and the verdict, being for \$ 600, was an increase of damages, which entitled him to his costs. We think this conclusion cannot be sustained to its full extent. Suppose it to be true, that the commissioners had no authority, originally, to assess damages in any other way than by awarding the payment of money ; still if they should direct that certain beneficial acts should be done by one party for the benefit of the other, and the parties should assent to and ratify it, as they might do, by proper acts, it would be valid and binding. It might be done by parol assent of the parties, made before the commissioners, and if formally ratified would be good. We cannot therefore say, that that part of the award was absolutely void. The commissioners, by their answer, state that they considered their award of \$ 500 and the expensive duties to be done by the corporation for the petitioner's benefit, as their award of damages ; that by renouncing the award, and claiming a re-assessment by jury, the petitioner renounced the benefits stipulated for him by the award, and that the verdict for \$ 600 cash, was less than the award of \$ 500 with the stipulated benefits, and therefore that he did not obtain an increase of damages, so as to entitle him to costs. The commissioners manifestly proceeded on the expectation that if their award was adopted, it would be ratified and confirmed in such manner as to be binding on the corporation, and that the petitioner would be entitled to the benefits stipulated for, as well as the sum of money awarded ; and if so, they were probably right in their conclusion, that such an award would have

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been of greater value to the petitioner than the damages assessed by the jury.

Acting upon this view of the case, the commissioners decided that the petitioner was not entitled to costs ; and in this, we cannot say that they failed in a plain duty, required of them by law, and which ought to be enforced by this extraordinary remedy.

Petition dismissed.

NEWELL SHERMAN *versus* JOSEPH ABBOT.

The owner of land first mortgaged it to the tenant and then conveyed it by deed of warranty to R., taking back a mortgage to secure the purchase money ; and R. conveyed it to the demandant. The deed to R. was recorded before the mortgage to the tenant, but after R's mortgage to the original owner. The mortgage from R. was not released or discharged, although the debt secured by it was said to have been paid, but after condition broken. The original owner and the tenant then conveyed the land to S., who reconveyed it to the tenant. It was *held*, that whether R's mortgage had or had not been paid, the *legal* title had passed by it to the original owner and remained in him, and that by the conveyances from him and the tenant to S. and from S. back to the tenant, it became vested in the tenant, and therefore a writ of entry by the demandant against the tenant could not be sustained.

THIS was a writ of entry to recover two parcels of land in East Sudbury. The demandant counted on his own seisin and a disseisin by the tenant. The tenant pleaded *nul disseisin*.

At the trial, before *Shaw* C. J., it appeared that both parties derived their title from Reuben Sherman senior.

The demandant produced in evidence a warranty deed embracing the premises, from Reuben Sherman senior to Reuben Sherman junior, dated May 9th, 1821 ; and a deed of the same land, from Reuben Sherman junior to the demandant, dated August 25th, 1828. Both of these deeds were recorded on August 30th, 1828.

On the same 25th day of August, 1828, the demandant mortgaged back the land to R. Sherman junior, to secure the payment of the purchase money in one, two and three years. This deed was recorded on August 30th, 1830.

The tenant then gave in evidence a deed of mortgage given by R. Sherman senior to the tenant, to secure the payment of \$1,550 in three, six and ten years, dated May 25th, 1818.

but not recorded until December 23d, 1829 ; and a mortgage deed dated May 9th, 1821, and recorded on May 5th, 1828, from R. Sherman junior to R. Sherman senior, given to secure the payment of three notes for the sum of \$ 1,100, payable, one on demand, another on May 9th, 1824. and the third on May 9th, 1828.

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The tenant then, in order to show, that the legal estate which was vested in R. Sherman senior by the mortgage deed from R. Sherman junior, was conveyed to the tenant, offered in evidence a warranty deed from R. Sherman senior to Samuel Sherman, dated June 3d, 1830, and recorded June 5th, 1830, embracing one of parcels claimed by the demandant. This deed did not purport to be subject to any mortgage, or to be the assignment of any mortgage or any note or other security for money. One question raised was, whether the legal estate held at the time by R. Sherman senior, as mortgagee, in this parcel of land, passed by this deed to Samuel Sherman, so that if after this deed R. Sherman senior received payment of the sum secured by the mortgage to him, the estate conveyed by him to Samuel Sherman would be defeated.

The tenant further produced in evidence a quitclaim deed from himself and Reuben Sherman senior to Samuel Sherman, embracing both parcels of the demanded premises, dated April 1st, 1833, and recorded May 9th, 1833 ; and a deed of mortgage from Samuel Sherman to the tenant, of the same date, and recorded in May, 1833, given to secure the payment of the sum of \$ 1,000.

The tenant contended, that, if the legal estate was in R. Sherman senior down to June, 1833, it passed by the above deed to Samuel Sherman, and on the same day, by the deed of Samuel Sherman to the tenant, it passed to him as mortgagee ; and this claim covers both parcels demanded.

The demandant then proposed to prove, that the mortgage given by Reuben Sherman junior to Reuben Sherman senior, under which the tenant claimed title, was paid and discharged in March, 1830. As there was no discharge in the registry of deeds, and no release or instrument of discharge offered, a doubt was expressed whether proof of payment after condition broken would wholly discharge the mortgage and revest the estate ;

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but for the purpose of presenting the whole case the evidence was admitted.

The chief justice being of opinion that the evidence would not warrant the jury in finding that the mortgage had been paid and discharged, the demandant became nonsuit subject to the opinion of the whole Court, upon the facts in the case. If the Court should be of opinion, that the demandant was entitled to recover, the nonsuit was to be taken off, and the tenant to be defaulted, or a new trial granted, as the Court might order; otherwise judgment was to be entered upon the nonsuit.

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Robinson and Mann, for the demandant, contended that the debt secured by the mortgage from Reuben junior to Reuben senior, had been paid, and the mortgage thereby extinguished, and therefore no estate remained in the mortgagee that could pass by the deed to Samuel Sherman. 1 *Powell on Mortg.* (Rand's ed.) 109 and notes, 145; *Porter v. Perkins*, 5 Mass. R. 233; *Somes v. Skinner*, 3 Pick. 52; *Wade v. Howard*, 6 Pick. 492, and 11 Pick. 289.

Farley and Mellen, *contra*, argued that the tenant acquired all the rights which Reuben senior held as mortgagee, and that the mortgager cannot maintain a writ of entry against the mortgagee upon payment after condition broken, unless there has been a release or discharge of the mortgage, but the remedy is by a bill in equity to redeem.

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WILDE J. delivered the opinion of the Court. The facts reported in this case are somewhat complicated. The titles of both parties are derived from Reuben Sherman senior, who in 1821 conveyed the demanded premises, with other lands, to Reuben Sherman junior, taking back, at the same time, a mortgage deed of the premises, to secure the whole or a part of the purchase money. Reuben Sherman junior, on the 25th of August, 1828, conveyed the premises to the demandant. His deed was recorded on the 30th of August, 1828. Prior to this conveyance, however, Reuben Sherman senior had mortgaged the premises to the tenant; but this mortgage was not recorded until after the record of the conveyance from Reuben Sherman junior to the demandant; and his title, therefore, as his counsel maintain, must be considered as the better title. But this is not the legal consequence of these

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conveyances ; for the mortgage deed from Reuben Sherman junior to Reuben Sherman senior, was recorded before the conveyance to the demandant, and nothing, therefore, passed by that conveyance to him but the equity of redemption. After these conveyances, the tenant, and Reuben Sherman senior, conveyed the premises to Samuel Sherman ; and it has been argued, that this by law operates as an extinguishment of the mortgage. But clearly it is no extinguishment of the mortgage from Reuben Sherman junior ; for Samuel Sherman had not his title as mortgager, which was then vested in the demandant. And if this conveyance to Samuel Sherman did operate as an extinguishment of the mortgage from Reuben Sherman senior to the tenant, it is immaterial ; for if so, then the legal estate passed to Samuel Sherman from the other grantor. After this conveyance, Samuel Sherman conveyed the premises to the tenant ; and by this conveyance the legal estate passed to him.

It is, therefore, immaterial, whether the mortgage debt from Reuben Sherman junior to Reuben Sherman senior, has been paid or not. For it has long been the established law in this Commonwealth, that the mortgager cannot maintain an action at law to recover possession of the mortgagee, after payment of the mortgage debt, unless the mortgaged premises are first released or discharged as the law directs.

Judgment on nonsuit.

LEVI HAWES *et al. versus* The Inhabitants of WALTHAM.

If a person summoned as trustee discloses, that he is indebted to the defendant and a third person jointly, without any thing further appearing, he is not chargeable ; and if charged upon such answer, the joint creditors may question the judgment collaterally, and may recover the full amount of their claims against him without any deduction on account of such judgment.

By an agreed statement of facts, it appeared, that the plaintiffs, Hawes and Wood, had contracted with the defendants to erect a barn on the town farm and to do some other work, for which the plaintiffs were to be paid the sum of \$ 800 ; that the

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work having been performed, the defendants paid to the plaintiffs on account thereof, the sum of \$ 600 ; that after this action was commenced, the defendants paid into court the sum of \$ 76.06 on the common rule, but refused to pay the balance of the sum of \$ 800, relying, for their defence, upon the proceedings in two actions brought against the plaintiff Wood, alone, by two of his separate creditors, in which the defendants were summoned as his trustees. In those two actions, the defendants, having disclosed in their answers, that they were indebted to Hawes and Wood, jointly, were thereupon charged in the Court of Common Pleas, as trustees of Wood alone. The plaintiff, Hawes, was also summoned as a trustee, in one of such actions, but was discharged upon his general answer.

If the Court should be of opinion, that the proceedings in those actions were admissible in evidence in the present action, and, if admissible, that they were a bar, so far as they went, to the claim of the plaintiffs, and that the sum paid into court was sufficient to cover any balance due to the plaintiffs, then they were to become nonsuit ; otherwise, the defendants were to be defaulted and judgment rendered for such sum as the Court should assess, with interest.

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Prescott and E. Hersey Derby, for the plaintiffs. The proceedings in the two actions against Wood were inadmissible in evidence, in the present action, being *res inter alios actæ*. Hawes was not a party in those actions. He had no right to be heard, no right to appeal, and no right of review. He cannot be bound by a judgment between other parties. *Walker v. Leighton*, 11 Mass. R. 140 ; *Taber v. Perrot*, 2 Gallison, 568 ; 1 Stark. on Evid. 267 ; *Rushworth v. Pembroke*, Hardres, 472 ; 12 Vin. Abr. 109, pl. 24.

But if such proceedings are admissible in evidence, then it is plain from them, that the defendants in the present action were erroneously charged. A debtor to a partnership cannot be charged as trustee of one partner. *Peirce v. Jackson*, 6 Mass. R. 242 ; *Goodwin v. Richardson*, 11 Mass. R. 470 ; *Fox v. Hanbury*, Cowper, 449 ; *Lyndon v. Gorham*, 1 Gallison, 367 ; *Church v. Knox*, 1 Connect. R. 514 ; *Fisk v. Herrick*, 6 Mass. R. 271 ; *Hawes v. Langton*, 8 Pick. 70.

Hawes was wronged by the decision of the Court of Com-

mon Pleas, and is entitled to redress in the present action. *Groves v. Brown*, 11 Mass. R. 337 ; *Wood v. Partridge*, 11 Mass. R. 488 ; *Andrews v. Henning*, 5 Mass. R. 210. If he cannot recover in this form of action, he cannot recover at all, and has lost a just debt without remedy.

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There will be no hardship on the defendants, as they have or had a remedy. *Richards v. Allen*, 8 Pick. 405 ; *Brigham v. Elliot*, 12 Pick. 172.

Farley and Emerson, for the defendants. If the plaintiffs prevail, the defendants will be without a remedy. They disclosed the facts in their answers, truly ; and the presumption should be, that the judgment against them was rightly rendered. If they had paid the amount for which they were charged as trustees, to Wood himself, such payment would have been a bar to the claim of the plaintiffs. The only question is, whether a payment to the creditor of Wood has a different effect. Hawes was also summoned as a trustee, and might have disclosed the partnership accounts ; and his answer would have aided the answers of the defendants. *Fisk v. Herrick*, 6 Mass. 271. No case goes so far as to decide, that if one partner in fact owns the partnership property, it may not be held by the trustee process for his several debts. If there had been an adjustment of accounts between Hawes and Wood, and the sum due from the defendants belonged to Wood, it could have been reached by the trustee process. Hawes having neglected to set forth the state of the partnership accounts, and being obliged to use the name of Wood in this action, and the judgments being in force against Wood and the defendants as his trustees, this action cannot be sustained.

SHAW C. J. delivered the opinion of the Court. The two plaintiffs, Hawes and Wood, performed certain work and labor for the defendants, by means of which the town became indebted to the two jointly. Before payment, suits were brought by two creditors of Wood alone, in each of which the town was summoned as trustee, since the statute, providing that corporations may be summoned as trustees. In each of those suits the town was charged, and a portion of the debt due to the plaintiffs jointly, was thus adjudged liable to be appropriated by process of law, to the payment of the several

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debt of one of them. This, we think, was erroneous. It seems now settled by authorities, that a joint debt cannot thus be severed and appropriated, in whole or in part, to discharge the several debt of one. *Fisk v. Herrick*, 6 Mass. R. 271 ; *Lyndon v. Gorham*, 1 Gallison, 367.

I am aware that it was suggested in some of the earlier cases, that it would be competent in such case to hold by attachment, any balance which would appear to be due to the defendant, upon an adjustment of the partnership accounts, and a balance struck ; and that for the purpose of obtaining evidence of the state of the accounts, it would be proper to make one of the other partners a trustee, upon whose disclosure the facts might appear. There is no decided case, in which such a course has been adopted under a judicial sanction ; and it is certainly doubtful, whether such a course could be adopted, consistently with the principles of the trustee process. Without insisting on the practical difficulties, of obtaining such a settlement of a general partnership account, in case of every attachment, and the difficulty of requiring a trustee who truly answers that he has no effects, to set forth and disclose facts relating merely to the liability of others, a strong objection is, that it assumes the right to use the answer of one trustee, to charge another, and in matters in which they may have adverse interests ; whereas, the fundamental principle of the old trustee process was, that the trustee must be charged, if at all, upon the facts disclosed in his own answer. *Hawes v. Langton*, 3 Pick. 67.

But it is not necessary to settle this question in the present case, because here, it appears, by the answers of the town that they were indebted to the two jointly, without any thing further appearing. In such a case, the Court are of opinion that they could not be charged, in a suit against one only.

Then the point is, whether this question can be considered and decided in this suit, and we think it can. We are of opinion, that as the plaintiffs were strangers to that suit, the judgment, as against them, is merely void, and therefore they must be allowed to question it collaterally ; otherwise they could not avoid it in any form. But if the defendants are now without remedy in this case, it must be, because by their own mistake

of their rights, or by laches they have failed to avoid it by an appeal.

If, however, they have not already paid over the money, they may probably have an opportunity on the *scire facias* to make a defence by force of the Revised Statutes, c. 109, § 41

Defendants defaulted and judgment for the plaintiffs.

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HEPZIBAH HALL, Administratrix, *versus* TURELL TUFTS.

A testator devised certain real estate to his wife for her life, and "the remainder of his estate, whether real or personal, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned them." It was *held*, that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from aliening the same before the expiration of the life estate, was void.

Where a note was given to "E. H." for a certain sum, payable on demand with interest, and some months afterward the promisor made a mortgage to E. H. & Sd, conditioned for the payment of a note of the same date, for the same sum, payable on demand with interest, it was *held*, in an action on the mortgage, that parol evidence was admissible to show that E. H. and E. H. & Sd were partners doing business in the name of E. H., and that the note to "E. H." was given for a debt due to the partnership, and was the note referred to and secured in the mortgage.

THIS was a writ of entry, on a mortgage. The plaintiff, as administratrix of the estate of Joseph P. Hall, demanded one undivided fifth part of certain real estate in Medford, declaring on the seisin of her intestate and a disseisin by the tenant. The tenant pleaded nul disseisin.

The case was submitted to the Court upon a statement of facts reported by a commissioner. It appeared, by his report, that in November, 1786, Simon Tufts made his last will, which was proved in January, 1787, wherein he gave the real estate described in the writ, to his wife for life, and "the remainder of his estate, whether real or personal, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned them."

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Turell Tufts, the defendant, and Hall Tufts, the mortgager, were two of the five children of the testator. His wife entered on the land in question, and held it until her death, which happened in August, 1830. The testator gave other lands to his children, on which they entered; and his estate was divided according to his will, by a warrant from the judge of probate, in 1790. In the early part of 1796, Hall Tufts sold all his patrimony except his portion of the remainder in the demanded premises.

On the 13th of March, 1798, Hall Tufts made a note of hand, whereby he promised to pay Ebenezer Hall or order \$495·21, on demand, with interest; which was in the handwriting of Ebenezer Hall 3d, son of Ebenezer, and was witnessed by him.

On the 5th of December, 1798, Hall Tufts being then resident at Hartford in Connecticut, made a deed of mortgage, in which he says, "I, Hall Tufts, of Medford, &c. do for and in consideration of the sum of \$495·21 had and received, and paid by Ebenezer Hall 3d, of Medford aforesaid, remise, release, and forever quitclaim unto the said Ebenezer Hall 3d, and to his heirs and assigns, all my right, title, claim and demand which I have in and unto all the real estate situate in Medford aforesaid, and is the same real estate which was given me by the will of my father Simon Tufts, &c. To have and to hold the above remised and released premises to him the said Ebenezer Hall 3d, and to his heirs and assigns forever, to his and their own proper use, benefit and behoof. . . . Always provided, and these presents are upon condition, that whereas the said Ebenezer Hall 3d, by a note of hand, dated Medford, March thirteenth, one thousand seventeen hundred and ninety-eight, for the sum of \$495·21, payable on demand and on interest, had and signed by Hall Tufts, and as a further security and collateral security for the payment of the sum contained in said note, this instrument is made. Now in case the said Hall Tufts shall well and truly pay to the said Ebenezer Hall 3d, the sum contained in said note and the interest thereof, then the foregoing instrument is to be null and void and of no effect, otherwise to stand and remain in full force, power and virtue in the law." The mortgage was written by Hall

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Tufts himself and was enclosed in his letter, dated at Hartford the 5th of December, 1798, and directed to Ebenezer Hall 3d. The deed was not acknowledged, but was proved by the testimony of one of the subscribing witnesses in 1807, after the decease of Hall Tufts, and was duly recorded.

The commissioner found that the mortgage was intended by Hall Tufts to secure the note above mentioned, because in his several letters of September 10th, 1798, addressed to Ebenezer Hall 4th, and of November 12th, December 4th, and December 5th, 1798, addressed to Ebenezer Hall 3d, (which were in the case and are described and quoted in the opinion of the Court) he acknowledges that he is indebted to Ebenezer Hall in a note of hand, and professes his willingness to secure it on any property "in possession, reversion, or expectancy"; and because the mortgage describes a note of the same date and amount as that which was held by Ebenezer Hall.

There were four persons living in Medford, named Ebenezer Hall. Ebenezer Hall 4th testified, that he never had any dealings with or claims upon Hall Tufts, and that he had often taken letters from the post-office addressed to Ebenezer Hall 4th, which on opening he found belonged to Ebenezer Hall 3d. These facts led to the conclusion, that in the letter above specified, addressed to Ebenezer Hall 4th, Hall Tufts had mistaken the legal designation of the Halls and supposed that he was addressing his creditor.

In the ledger of Ebenezer Hall were entries, in an account opened with Hall Tufts, of a charge, under date of September 15th, 1797, of £ 85 19s. 2d., for rum, and a credit under date of March 12th, 1798, of the same amount, by note. These entries were in the handwriting of Ebenezer Hall 3d.

In 1810, Ebenezer Hall 3d, (then Ebenezer Hall 2d, his legal designation having been changed, in consequence of his father's death,) assigned the mortgage to Joseph P. Hall, his heirs, &c. "with the right to receive to his and their own use, the sum mentioned in the condition of said deed, whenever the same shall be legally tendered or paid agreeably to the condition thereof." Joseph P. Hall died in 1813, and the demandant was duly appointed his administratrix.

Hall Tufts died in 1801; and from the time of making the

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note he had no visible means of paying it, except by the property mortgaged.

The tenant, after the decease of his mother and until the commencement of this suit, held exclusive possession of the real estate in question, denying all right of the demandant thereto.

Ebenezer Hall, the elder, died in 1800, leaving two sons and a daughter. Ebenezer Hall 3d, the eldest son, was born in 1770, and died in 1812. Gilbert Hall, the second son, was born in 1771, and died in 1802, without issue and unmarried. The two sons, when they respectively came of age, or soon after, became jointly interested with their father in the business of a distillery and store, and neither of them did any business except in this connexion. The books were kept in the name of Ebenezer the elder till the time of his decease, in 1800, though Ebenezer the son made the purchases of goods for the store and distillery and gave his own notes for them; which notes were generally indorsed by his father, who gave little attention to business after his sons became connected with him. Ebenezer Hall 3d was appointed administrator of the estate of his father. The note of Hall Tufts was not indorsed by any one. In the assignment of the mortgage, Ebenezer Hall 3d does not style himself administrator or surviving partner. The note was not inventoried as a part of the personal property of his father. The husband of the testator's daughter assented to the claim of Ebenezer Hall 3d to hold all the stocks and demands of the distillery and store as surviving partner.

The tenant objected to the statement of the intent of Hall Tufts to secure the note above described, and to the evidence from which that intent was inferred, and to the evidence of the copartnership. He also objected to the recovery of the demandant, on the grounds, that the note produced did not comport with the mortgage deed, and was not intended to be secured thereby; and that by the terms of the will of Simon Tufts, Hall Tufts could not dispose of his share of the land in question, in his mother's lifetime.

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A. Peabody and *A. Bartlett*, for the demandant.

Hoar and *F. Dexter*, for the tenant, contended that the estate given to Hall Tufts was a contingent remainder, which

was defeated by his dying before his mother and went over to his heirs, and that consequently nothing passed by his deed of mortgage. But they relied more particularly on the point, that the note was made to one person and the mortgage to another, and that parol evidence that the mortgage was given by mistake to the wrong person, or to secure a note differing from the one described in the deed, was inadmissible, as it would vary the written contract. *Fitzhugh v. Runyon*, 8 Johns. R. 292; *Montague v. Smith*, 13 Mass. R. 396; *New Berlin v. Norwich*, 10 Johns. R. 229; *Dwight v. Pomeroy*, 17 Mass. R. 303. They said the case of *Johns v. Church*, 12 Pick. 557, cited on the other side, had carried the law further than it has ever been carried before, and was not sustained by any authority.

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PUTNAM J. delivered the opinion of the Court. It is objected for the tenant, that the mortgager could not, according to the terms of the will of Simon Tufts, under which he claimed, convey the estate during his mother's lifetime; that it was a life estate to the mother, with a contingent remainder to the children of the deviser, expectant upon their surviving their mother, and that the shares of those who died in her lifetime, should go to the heirs; and if so, that then the deed which was made in the lifetime of the mother, passed nothing.

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This depends upon the true construction of the will.

The deviser, by his will, gave the demanded premises to his wife for life, and he gave "the remainder of his estate, whether real or personal, in possession or reversion, to his five children, (of whom Hall Tufts, the mortgager, was one,) to be equally divided to and among them or their heirs respectively, always intending and meaning, that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned." His wife survived him, entered on the premises and held them until her death, which happened on the 30th of August, 1830.

The clause in the will which follows immediately after the devise of the remainder to his five children, is manifestly against the rule of the law, which enables one seised of a vested remainder, to dispose of it during the existence of the life estate. It is manifest that he intended to give to them the remainder in

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fee, expectant upon the death of his wife. But his intent that they should not dispose of their part until it should be assigned to them in severalty, was wholly inconsistent with the law, and must be rejected. 60 Lit. 223 a ; Lit. § 360: "If a feoffment be made upon condition that the feoffee shall not *alien* the land to any, this condition is void, because when a person is enfeoffed of lands or tenements, he hath power to alien them to any person *by the Law*." And the like law is of a devise in fee upon condition that the devisee shall not alien ; the condition is void. The general intent of the testator is clear, and is to be carried into effect notwithstanding any desire expressed concerning the mode of enjoyment of the bounty, which is inconsistent with the rules of law. Such an intent must be disregarded. "When the particular intent cannot be executed, the general intent must direct the construction." *Parsons C. J.*, for the whole Court, in *Hawley v. Northampton*, 8 Mass. R. 37. Here the particular intent cannot be executed consistently with the rules of the law.

We are all satisfied that this objection cannot prevail ; that this was a vested remainder in the five children, and that Hall Tufts (one of them) might legally dispose of his undivided fifth part of it in the lifetime of his mother, the tenant for life.

But the material objection is, that no debt is proved to be due to Ebenezer Hall 3d, the mortgagee ; that the note produced is payable to Ebenezer Hall, and not indorsed by him ; and it is contended that parol evidence cannot be received to show that Ebenezer Hall 3d, the person named as the mortgagee, was the same person named as Ebenezer Hall in the note ; in short, that there is no note produced to which the mortgage can be intended to refer.

Whether the note produced be the one which was referred to in the mortgage, is a fact which may be proved by parol evidence. It comes within the principle of parcel or not, of the premises intended to be conveyed.

In the case at bar, there is a mistake of 1000 years in the description of the note which is found in the mortgage. It is there said to be dated Medford, March 13th, one thousand seventeen hundred and ninety-eight ; but the note produced bears date Medford, March 13th, 1798. This is so palpably

a mere clerical mistake, that no reliance is made upon it by the counsel for the tenant.

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But the note is payable to Ebenezer Hall, and the mortgage is to Ebenezer Hall 3d, and they are different persons, and not one person known by the same name, or sometimes by one name and sometimes by the other name. How then can Ebenezer Hall 3d be considered as the payee, in such manner as to be authorized to collect or take security for payment of the note, without any indorsement of it by Ebenezer Hall?

We think that the facts found by the master, and found too upon legal evidence, furnish an answer to the inquiry. Ebenezer Hall 3d, was the partner of Ebenezer Hall, and the note was given, in part at least, for *merchandise* received by the promisor which belonged to the partners, as well as for money lent to the promisor. Ebenezer Hall, the payee, died in May, 1800. His sons Gilbert and Ebenezer 3d, were jointly interested with him in the business of a distillery. The books were kept in the name of Ebenezer Hall, until the time of his decease. Gilbert died in 1802, and Ebenezer 3d, in 1812. The sons transacted the business of the company, which was carried on in the name and firm of "Ebenezer Hall." Upon the death of the father, this note was not inventoried as a part of his individual separate estate, yet the inventory contains a list of many notes due to him; but this note was, with the rest of the partnership property, taken into possession and disposed of by Ebenezer Hall 3d, as the surviving partner of the firm of Ebenezer Hall, with the knowledge and consent, or without any objection, of the heirs of Ebenezer Hall, the father.

The demandant must prove that the note which she produces is the one to which the mortgage deed refers. The deed is to Ebenezer Hall 3d, and the note is payable to Ebenezer Hall. But the condition contained in the mortgage does not state the name of the payee. It runs thus: "Always provided, and these presents are upon condition, that whereas the said Ebenezer Hall 3d, by a note of hand dated Medford, March thirteenth, one thousand seventeen hundred and ninety-eight, for the sum of four hundred and ninety-five dollars twenty-one cents, payable on demand and on interest, *had* and signed by Hall Tufts." Now this recital merely states, that Ebenezer

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Hall 3d, had a note signed by Hall Tufts, of the date and sum before mentioned. He was the holder of such a note. The recital goes on, "and as a further security, and collateral security, for the payment of the sum contained in said note, this instrument is made." Then comes the condition: "now, in case said Hall Tufts shall well and truly pay to the said Ebenezer Hall 3d, the sum contained in said note, and the interest thereof, then the foregoing instrument is to be null and void, and of no effect, otherwise to stand and remain in full power and virtue in the law." There is no evidence that Ebenezer Hall 3d, ever had any other note against Hall Tufts than the one now produced. If the note had been payable to Ebenezer Hall, and indorsed by him, Ebenezer Hall 3d, as the indorsee and holder, might well take a mortgage to secure the payment; and so if he held such a note as a partner of the firm of Ebenezer Hall, he might well take a mortgage to secure it. The deed was written at Hartford, but the note was then at Medford. It might not be in the power of the mortgager to give a more particular description of it. He knew the sum, and the place where the note was made, and the date; and the correspondence shows that the mortgage was made at the request of Ebenezer Hall 3d. Under these circumstances, we cannot doubt but that parol evidence may be admitted to prove that the note now produced was the one to which the deed of mortgage referred.

And the case finds that the mortgage was given and intended to secure the note given to Ebenezer Hall, for the consideration aforesaid, which had been received from the company. The note and mortgage were assigned by Ebenezer Hall 3d (by the name of Ebenezer Hall 2d,) to the plaintiff's intestate for good consideration, on the 3d of July, 1810.

The evidence reported can leave no possible doubt upon these facts.

The mortgage was made by Hall Tufts, at the request of Ebenezer Hall 3d, as appears by the letter of Hall Tufts, of December 5th, 1798, inclosing the deed of that date, from Hartford. He begins this letter by addressing Mr. E. Hall, and at the close of it he addresses Mr. E. Hall 3d. A circumstance showing that the one had as much concern in the

affair as the other. In the letter dated the day before that addressed to Ebenezer Hall, he speaks of receiving his son's letter, and says, "nothing is more natural than *your anxiety* about a note so situated." "But (he adds) what could induce Eben. to suspect my inclination to do every thing in my power to secure *him*, I am sure I know not." Thus indirectly acknowledging the concern or interest which both had in the note.

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In his letter of the 10th of September, 1798, addressed in the inside to Mr. E. Hall, and by singular carelessness, on the outside, to Ebenezer Hall 4th, (who had never had any business with Hall Tufts,) he refers to the consideration of the note: "Borrowed money above all other negotiations, deserves the first attention, and the want of ability to return you not only what I have received this way, *as well as by the purchase of rum*, has given me the greatest distress." Thus placing the money and rum to the same account. The charges for the rum were made in the handwriting of Ebenezer Hall 3d, in the company books of "Ebenezer Hall."

It would be unnecessary to dwell longer upon these, or to refer to a great many other circumstances in the case proving, to the entire satisfaction of the Court, that there was such a partnership in the name and firm of Ebenezer Hall, and that the consideration of the note was the money and rum which belonged to the company. It was a note payable to the firm of "Ebenezer Hall." Ebenezer Hall 3d had a right to collect or receive the money due upon it, and if not paid, a right to take any collateral security for the payment of the same, he being accountable for the proceeds to the company. If he had foreclosed the mortgage, he would have been seised for the use of the company. He would be just as liable to account for the land, as he would have been for the money which he might have received for the note. The proceeds of the collateral security always should enure to the benefit of those who own the principal fund.

This, therefore, is not the case of a note given to one man and a mortgage given to another, but it is an undertaking to pay the amount of the note to partners, either of whom had a legal right to receive payment, to take security, or to discharge the whole upon satisfaction.

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In coming to this result, we are guided by well known rules of law. For it cannot be contended, that the consideration of the note, and whether that which is produced is the one to which the mortgage referred, and also the question, whether there was a partnership or not, are not matters which may be proved by parol evidence. And these things being established, the legal result arises from clear principles of law. The deed to Ebenezer Hall 3d may stand as it is, and was made, to secure the debt due to the partnership. Ebenezer Hall 3d might assign the mortgage and the note as surviving partner, being accountable accordingly upon a final settlement of the concerns of the firm.

So we all think, that equity and the law unite in the opinion which we give, that the judgment shall be rendered for the demandant as upon a mortgage, according to the law in such case provided.

HAMILTON DAVIDSON *versus* RUFUS SLOCOMB.

Upon an appeal from the judgment of a justice of the peace, to the Court of Common Pleas, if it appear, that the justice died before extending the record of his proceedings in form, his original minutes containing all the material facts which the record would have comprised, will be regarded as substantially a record.

If, in such case, the appellant is prevented by the death of the justice from producing in court a copy of the whole case attested by the justice, in pursuance of St. 1783, c. 42, § 6, [Revised Stat. c. 85, § 15,] the deficiency may be supplied by a sworn copy.

ASSUMPSIT on an account for the sum of \$9.70. The writ was dated August 7th, 1834. It appeared, that the action was originally commenced before Joseph Tufts, Esq., late of Charlestown, deceased, a justice of the peace; that on the 12th day of September following, judgment was rendered by him in favor of the defendant; that the plaintiff thereupon claimed an appeal, and subsequently entered into a recognizance with a surety, to prosecute the appeal with effect; that the action was entered by the plaintiff, at the December term of the Court of Common Pleas in 1834, and continued to the December term of that court in 1835, when it was agreed between the parties, that the action should be referred, and that

judgment should be entered upon the record of the court as ordered by the referee ; and that the referee, having heard the parties, awarded in favor of the plaintiff.

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The agreement and award having been filed in the Court of Common Pleas, the plaintiff moved that the award of the referee might be accepted and judgment be rendered thereon. The plaintiff did not produce copies of the writ, judgment, claim of appeal, &c. certified by Tufts ; but he offered to prove, that Tufts, who died in July or August, 1835, never made up any record of his proceedings and judgment in such action, but only made minutes from which the record could have been made up by him if he were living ; and he produced sworn copies of the writ, return and pleadings, and of the minutes of the proceedings before the justice made by him.

The defendant objected to the acceptance of the award, for the following, among other reasons :

1. Because it did not appear, that there was any record of a judgment, made by the justice before whom the case was originally tried.

2. Because the copies of the original writ and other papers in the case were not certified by such justice.

The Court of Common Pleas ruled that the evidence offered by the plaintiff was inadmissible for the purpose for which it was produced.

The plaintiff excepted to the ruling of the Court.

Buttrick, for the plaintiff, cited 1 Stark. on Evid. 155 ; *Baldwin v. Prouty*, 13 Johns. R. 430 ; *Posson v. Brown*, 11 Johns. R. 166 ; Bull. N. P. 228 ; *Beal v. Langstaff*, 2 Wils. 371.

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Mills and E. Smith, for the defendant, cited *Clap v. Clap*, 4 Mass. R. 520 ; *Benn v. Borst*, 5 Wendell, 292 ; *Webb v. Alexander*, 7 Wendell, 281.

WILDE J. delivered the opinion of the Court. Several objections have been taken to the regularity of the proceedings in this case, which, as the plaintiff's counsel allege, have been waived by the submission of the case to the judgment of an arbitrator. But as we are of opinion that none of the objections are well founded, we have not considered the question of the alleged waiver.

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It is objected, in the first place, that there is no record of the proceedings before the justice, and of the judgment and appeal therefrom. It is true, that the minutes of the justice are not technically a record ; but they contain all the material parts which the record would comprise, if it were made up at large and in the usual form, and as the record has not been thus extended in form in consequence of the death of the justice, the minutes are to be regarded as substantially a record of the proceedings, and are entitled to the same credit as a record at large would be, if it had been thus made up. The minutes in the journals of the House of Lords are held to be records, and a copy of them is admissible in evidence. *Jones v. Randall*, Cowp. 17 ; Bac. Abr. *Evidence*, F.

It is, in the next place, objected, that the appellant has not produced a copy of the whole case, attested by the justice, as he was bound to do by the St. 1783, c. 42, § 6. But this he has been prevented from doing, by the death of the justice. The statute does not expressly require, that the copy of the case should be attested by the justice, though undoubtedly such an attestation would be required, if the justice were living. The next best evidence is therefore admissible. This the appellant has produced, namely, sworn copies of the writ, service and pleadings, and of the minutes of the proceedings before the justice, made by him, by which it appears that judgment was rendered, that an appeal therefrom was claimed and allowed, and that the appellant recognized with a surety to prosecute the appeal. That sworn copies are admissible, under the circumstances of this case, we hold to be very clear. They may in all cases be admitted where office copies cannot be had. It is a general rule of evidence, that records may be proved by exemplifications under seal, or by office copies, or by sworn copies. Bac. Abr. *Evidence*, F. The appellant has produced the best evidence that could be obtained, and that is sufficient, and I may add, entirely satisfactory.

The minutes of the justice are entitled to full credit ; and that they have been correctly copied cannot be doubted. *Baldwin v. Prouty*, 13 Johns. R. 430 ; *Posson v. Brown* 11 Johns. R. 166.

New trial granted.

PHINEHAS STONE *versu*: CALEB SYMMES Junior.

W. being indebted to the plaintiff in the sum of \$ 10·31 agreed to pay him in labor the plaintiff saying, that when he was ready he would call on W. Afterwards W. agreed to work for the defendant ; and while he was so employed, the plaintiff went with him to the defendant, and asked the defendant if he would give W. up ; but the defendant replied, that he would not, and that he would see the debt paid or would pay the debt ; and W., in consequence of such promise, remained in the defendant's employment. The Court were inclined to think, that there was a sufficient consideration for the promise of the defendant, in the benefit which he received from the continuance of W. in his employment ; but they *held*, that, as there was no evidence that the plaintiff discharged his claim against W., such promise, not being in writing, was void by the statute of frauds.

THIS was an action of assumpsit, brought upon an alleged promise of the defendant to pay a debt due from Benjamin Woodward to the plaintiff.

In the Court of Common Pleas, the parties stated a case.

It appeared by the testimony of Woodward, that in the spring of 1834, he was indebted to the plaintiff in the sum of \$ 10·31, and agreed to pay him in labor ; that the plaintiff, being about to build a house, told the witness, that he would call on him, when he, the plaintiff, should be ready ; that on June 17th, 1834, the witness agreed to work for the defendant at the rate of one dollar per day, until the last of August ; that the witness accordingly entered into the defendant's employment ; that in the latter part of June, the plaintiff went with the witness to see the defendant ; that the plaintiff said to the defendant that he must have the bill paid or Woodward's work, and asked him if he would give Woodward up ; that the defendant replied, that he would not, and that he would see the bill paid or would pay the bill on demand ; that the witness thought, that there was something due to him from the defendant, at that time, and that something was still due, but could not tell how much ; that he was to have eight shillings per day if he worked for the plaintiff ; that the witness considered, that he remained in the defendant's employment by reason of the defendant's agreement to pay the bill ; and that if the defendant had not agreed to pay the bill, the witness would have gone to work for the plaintiff.

The Court of Common Pleas decided, that upon these facts the plaintiff was entitled to recover.

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The defendant excepted to this decision, on the ground that the promise made by him was without consideration, and void by the statute of frauds, it being a promise by one to pay the debt of another, and that no new legal or sufficient consideration arose as between the plaintiff and the defendant.

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A. W. Austin, for the defendant, cited *Packard v. Richardson*, 17 Mass. R. 122 ; *Perley v. Spring*, 12 Mass. R. 297 ; *Williams v. Leper*, 3 Burr. 1886 ; *Tileston v. Nettleton*, 6 Pick. 509 ; *Cabot v. Haskins*, 3 Pick. 83 ; *Forth v. Stanton*, 1 Saund. 210 ; *King v. Wilson*, 2 Strange, 873 ; *Fish v. Hutchinson*, 2 Wilson, 94 ; *Matson v. Wharam*, 2 T. R. 80 ; *Anderson v. Hayman*, 1 H. Bl. 120 ; *Bourkmire v. Darnell*, 1 Salk. 28 ; *Buckmyr v. Darnall*, 2 Ld. Raym. 1085 ; *Harris v. Huntbach*, 1 Burr. 373.

Bultrick, for the plaintiff. This was an original promise made on a sufficient consideration. The least consideration will support it. *Train v. Gold*, 5 Pick. 380 'The plaintiff had acquired a right to Woodward's services ; and he relinquished this right and discharged his claim against him, in consequence of the defendant's promise. This result was an injury to the plaintiff. Woodward had a control over his own services, and would have worked for the plaintiff, but for the promise of the defendant. The defendant was unwilling to give him up, and, therefore, derived an immediate benefit from the promise. Woodward's services were the fund out of which the plaintiff was to be paid ; and they were assigned to the defendant. *Castling v. Aubert*, 2 East, 325. It is not material that there is a collateral claim, if the promise declared on was originally made on a new consideration. *Williams v. Leper*, 3 Burr. 1886.

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PUTNAM J. delivered the opinion of the Court. We are inclined to think, that there was a sufficient consideration for the defendant's promise, in the benefit which he received from the agreement of Woodward to continue to labor for him, instead of leaving his employment and going to work for the plaintiff, according to a previous agreement between the plaintiff and Woodward. The debt due from Woodward to the plaintiff was very small ; and it might have been more advantageous to the defendant to pay the debt of Woodward to the

plaintiff, and have Woodward continue on his labor for the defendant, than it would have been to have Woodward leave the defendant's employ under the then existing circumstances.

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But there must not only be a good consideration for the promise, but, if it be for the debt of another, it must be in writing, or it will come within the statute of frauds, and may be avoided. If the debt of Woodward to the plaintiff was discharged, then this might be considered as an original undertaking of the defendant, and so would not come within the statute. And that is the true criterion to be observed in the present case.

Now we do not think that there is any evidence in the case to show, that the plaintiff did discharge his claim against Woodward. The case finds, that the plaintiff said, that he must have the bill paid or have Woodward's work. But he got neither one nor the other. He got only a promise of the defendant to pay the debt which was due from Woodward to the plaintiff, and Woodward continued to work for the defendant.

It would, perhaps, have been sufficient, if the plaintiff had then expressly discharged Woodward in consideration of the defendant's promise, so relying upon it as an original undertaking, and upon the loss of his claim against Woodward, as the consideration for the promise of the defendant; but there is no evidence of such an express discharge; and no facts are stated from which even an implied discharge of Woodward is to be necessarily inferred. Woodward's liability to the plaintiff continued. At most, the plaintiff agreed to suspend his claim for such time as he pleased, but not to abandon or discharge it at all events. So the debt which the defendant undertook to pay was the debt of Woodward which was due to the plaintiff, and not the defendant's own debt; and the case, we all think, comes precisely within the true intent and meaning of the statute.

The judgment of the Court of Common Pleas is reversed, and the plaintiff is to become nonsuit.

NATHANIEL WATSON *versus* The Inhabitants of CAMBRIDGE.

Where an alien woman having a nursing infant, which stood in need of immediate relief, was committed to a jail or house of correction, it was *held*, that such infant was not within the provision of any of the statutes making the support of convicts and persons confined on criminal prosecutions a charge upon the Commonwealth. St. 1794, c. 48, § 1. [Revised Stat. c. 143, § 15, 16.]

If the town in which the house of correction is situated, after due notice and request by the master thereof, refuse to assume the support of such infant, the master may recover against the town, the expenses incurred by him on account of such infant, for clothing, medicine, washing, &c.

But he cannot recover against the town for any articles of food and nourishment furnished the mother in consequence of her having an infant at the breast, different from, and in addition to, what he was required to furnish to other inmates of the house of correction; but the expenses thereof are chargeable to the Commonwealth, in the same manner as the general support of the mother.

By an agreed statement of facts it appeared, that this was an action brought by the keeper of the jail and master of the house of correction in Cambridge, to recover for the support of certain nursing infants, who were paupers; that the mothers of the paupers were foreigners having no legal settlement in this State, and were duly sentenced to, and confined in, the jail or house of correction during the time when the plaintiff furnished such support; that at the time of their committal, they had their infants with them; and that in each case due notice, and request of payment, were given and made to the overseers of the town of Cambridge.

The plaintiff furnished the paupers, who were in a destitute condition, with the clothing and medicine necessary for their relief and comfort, and procured their washing and such other things to be done, as the mothers could not do in consequence of their confinement. The mothers, however, took the principal care of the paupers; and the plaintiff furnished no food for the paupers, (except crackers and milk occasionally,) but supplied the mothers with some articles of food and nourishment, in consequence of their having infants at the breast, different from, and in addition to, what he was accustomed or required to furnish to other inmates of the jail or house of correction.

The plaintiff was paid the fixed allowance per week, for the support of the mothers, but had received nothing for what he had done or furnished for the children.

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If the Court should be of opinion, upon these facts, that the plaintiff was entitled to recover any thing in this action, he was to have judgment for the amount of his account, with interest ; otherwise he was to be nonsuited.

Bultrick, for the plaintiff, cited *Cargill v. Wiscasset*, 2 Mass. R. 547 ; *Doggett v. Dedham*, 2 Mass. R. 564 ; *Adams v. Wiscasset*, 5 Mass. R. 329 ; *Sayward v. Alfred*, 5 Mass. R. 244 ; *St. 1793, c. 59, § 9, 13.*

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Chamberlain, for the defendants.

SHAW C. J. delivered the opinion of the Court. These infants were persons casually placed under the care of the jailer and master of the house of correction, as necessarily accompanying their mothers, when committed ; but they were not themselves committed for any crime or offence, or by order of law. They were, therefore, not within the provision of any of the statutes making the support of convicts, and persons confined on criminal prosecutions, a charge upon the Commonwealth. *St. 1794, c. 48, § 1.* [Revised Stat. c. 143, § 15, 16.] But they were persons, found in the town of Cambridge, standing in immediate need of relief, of which, in each case, the town had notice, and they were bound to furnish such relief. *St. 1793, c. 59, § 9, 13.* The plaintiff was an inhabitant of Cambridge, not liable for the support of these paupers, so situated that it was proper that he should relieve them, and, therefore, after notice, by force of the statute the town became liable to pay him. *St. 1793, c. 59, § 13 ; Cargill v. Wiscasset*, 2 Mass. R. 547 ; *Sayward v. Alfred*, 5 Mass. R. 244.

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On notice to the overseers of the town where the pauper happens to be, or is thus found, they must judge whether they will pay the keeper of the house of correction, or provide for the support of the child themselves, in some other place ; and in either case they will have their remedy for reimbursement, either on the town of the child's settlement, if there be any within the State, otherwise upon the Commonwealth. If indeed the infant is of such tender years, that it would be obviously unfit and improper to remove it from the mother, the

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same rule would apply, as in case of a pauper too ill to be removed, or where from any cause a removal would endanger life or health. Such a case would obviously be an exception to the right of overseers to remove, and would oblige the town to afford relief at the place where it is required.

But in the present case, the defendant town, not admitting their liability, refused to assume the support of these children, in any form, and, therefore, by the general law became liable to the plaintiff, who furnished it, after notice. The law, in this respect, is not changed by the Revised Statutes.

Whatever was done for the mothers, though the allowance was greater than would have been made if they had not had nursing children, must still be considered as done for the relief of the mothers, and as such chargeable to the Commonwealth, in the same manner as the general support of the mother.

Defendants defaulted.

ABRAHAM W. FULLER *et al.* *versus* ABRAHAM A DAME.

An agreement between D. and F. recites, that D. is the owner of land which would be enhanced in value if the Boston and Worcester Rail Road Corporation should establish their depot on certain flats, and that in order to procure the corporation to make such location of the depot, it is necessary to form a joint stock company to purchase the flats and give a portion thereof to the rail road corporation for the depot, and that F. has agreed to aid in getting up such a company and in causing the rail road corporation to fix its depot on the flats, it being understood that he is of opinion that the rail road corporation, with a view to the public good and the interest of its stockholders, ought to have its depot there; and D. agrees to make F. a pecuniary compensation, so soon as the depot shall be located on the place specified. A company was accordingly formed and incorporated, with power to purchase and hold the flats and to give a portion thereof to the rail road corporation as an inducement to establish the depot thereon, and an agreement was made between the two corporations by which the depot was located on the flats. F. was a member of the rail road corporation at the time when he made the agreement with D., and subsequently became a member of the joint stock company. This agreement was known only to the parties and the subscribing witnesses, though there was no stipulation that it should be kept secret. It was *held*, that this agreement was contrary to public policy and to open, upright and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot, and the interests of the two corporations, and consequently it was invalid.

ASSUMPSIT by the indorsees against the maker of a promissory note, dated the 1st of October, 1832, for \$9600, payable

n three years from date, to Henry H. Fuller or his order, and by him indorsed to the plaintiffs. Trial before *Shaw C. J.*

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It was in evidence, that at the time when the note was made, the promisor and promisee entered into the following agreement, of the same date with the note, in the presence of George Morey and Nathaniel R. Cobb, who were subscribing witnesses : —

“ This agreement, between Abraham A. Dame, of Boston, and Henry H. Fuller, of said Boston, witnesseth, that whereas said Dame is the owner of a large tract of land and flats situated on Sea street, and between Sea street and Front street, in said Boston, which land and flats will be greatly enhanced in value by causing the Worcester Rail Road to locate one of its places of principal deposit eastwardly of Front street, and between said Front street and Sea street : And whereas, in order to procure said Boston and Worcester Rail Road Corporation to locate its place of deposit between said streets, it is ascertained to be necessary to form an association, who shall pay to said corporation a large sum of money and furnish a large tract of land for such place of deposit, to be given to said corporation, besides other donations to be furnished to said corporation ; and to provide and raise said money and land and donations, it is necessary to form a large company to purchase the flats and land between said Sea and Front streets, to be held as joint stock, and laid out in due form and shape for sale : And whereas said Fuller has agreed with said Dame, that he, said Fuller, will aid in getting up such a company, and in causing said rail road corporation to fix its termination and its principal place of deposit between said streets ; it being understood that said Fuller is of opinion, that said rail road ought, from a view to the public good and the good of the stockholders therein, to enter the city at the southerly part thereof, and to have its principal place of deposit as above expressed : Now, therefore, it is agreed, that a certain promissory note, dated this day, and signed by said Dame, payable to said Fuller, for nine thousand and six hundred dollars, payable in three years, and now lodged with Nathaniel R. Cobb and George Morey, both of said Boston, shall be delivered to said Fuller by said Cobb and Morey, or the survivor of them, so soon as said

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Boston and Worcester Rail Road Corporation shall have made and located the principal depository for merchandise, of said rail road, at some place between said Sea street and Front street ; which note, being so delivered to said Fuller, shall be his property, and shall be paid to him and recoverable by him, as justly due and owing to him, according to its tenor. It is agreed Mr. Cobb may hold the contract and the note."

The note and the agreement were placed in the custody of Mr. Cobb and Mr. Morey, and by consent of all parties, were to be held by Mr. Cobb.

At or about the same time, the sum of \$400 in cash was paid by Mr. Dame to Mr. Fuller, on the same account.

Some time after this transaction, Cobb died ; and in November, 1835, his administrator put the note into the hands of Mr. Morey. It was not then indorsed. Mr. Fuller demanded of Mr. Morey the delivery of it ; Mr. Dame objected, on the ground that it was held upon condition, and the condition had not been complied with. Mr. Morey, knowing that the note could not go into the hands of an indorsee, except as a note overdue and subject to any defence which the maker might have against the promisee, and intending to leave the parties to their legal rights, delivered it to Mr. Fuller ; soon after which this action was commenced.

Under these circumstances, the defendant said that the same defence might be made against the plaintiffs as might have been made against the promisee, and that the note and the agreement were to be taken as parts of one and the same transaction ; and thereupon he took these grounds of defence :—

1. That it was a condition precedent to a delivery of the note, and of course to a recovery upon it, that the rail road corporation should have made and located their principal depository for merchandise, at some place between Sea street and Front street ; and that at the times when the note was delivered, and when this action was brought, no such depository had been so made and located.

2. That there was no legal and sufficient consideration to support the promise.

3. That the object of the agreement was to influence the decision of a question of public convenience and accommodation, in which the community had an interest to have the best

location of the rail road ; that a private agreement to aid in establishing a particular location, to the exclusion of others, was contrary to public policy ; and that a promise to pay money for such aid was invalid.

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4. That the agreement contemplated the establishment of a large joint stock company with corporate powers, of which Mr Fuller was to become a member ; and that a separate agreement, for a pecuniary consideration, not known to other members and stockholders, to induce them to become members and to influence their acts and decisions, had a tendency to mislead them, and so was contrary to public policy, and void.

In reference to these several grounds of defence, it was proved, that a company had been formed and incorporated, called the South Cove Corporation, for the purpose of partially filling up the flats between Sea street and Front street ; that by the votes of that corporation and of the rail road corporation, and by contracts made between them, it was stipulated that the principal depositories of the rail road corporation, both for merchandise and for passengers, should be established on land between those two streets within the South Cove ; and it was considered by the parties, that these depositories were definitely located, so far as it could be done by votes and contracts ; but no deed of the land had yet been given by the South Cove Corporation to the rail road corporation ; the former, however, were ready to execute such deed whenever required, the delay having been by mutual consent, and for their own convenience. A place had been appropriated within the cove, for a principal depository of merchandise, and a wharf had been erected, on which it was intended to erect warehouses, sheds and yards for such a depository, but no buildings were yet erected thereon. Preparations had been made, and the work was in progress, for laying out, grading, and preparing tracks for rail roads, within the cove, but no rails had yet been laid down east of Front street, nor any place east of Front street been yet used as a depository of merchandise. The rail road corporation had a depository for that purpose, at a place west of Front street ; which, however, they deemed temporary. The location of the depot at the place appropriated for it within the cove, was considered by the engineer of the rail road corpora-

Fuller tion to be a favorable one, and he advised to the adoption of it in preference to any other.

In regard to other parts of the case, it was proved that the defendant, either by himself or with others, was a large proprietor of flats and wharves situated near the South Cove ; that about a year before the trial he sold that estate at a very great advance upon the cost ; that about the time when the above agreement was entered into and before the location of the depot was fixed upon, Mr. Morey conversed with the defendant and stated that if the cove could be filled, it would be a good place, but it would require that a company should be got up to do it, and that somebody must go forward and aid in organizing a company ; and he believed he mentioned Mr. Fuller as a suitable person. There was supposed to be some diversity of interest between the proprietors on Sea street, and those on Front street, and he thought Mr. Fuller would be acceptable to the latter. He knew nothing of the particular agreement above set forth, until he was called upon to witness it and take the custody of the note.

Mr. Fuller was a proprietor of shares in the rail road corporation at the time of making the agreement, and ceased to be a proprietor in August, 1833. He took about twenty shares in the South Cove Corporation, but was not among the early subscribers. Both he and the defendant were members of the legal profession.

The plaintiffs proposed to offer proof, that in pursuance of the agreement Mr Fuller did perform valuable and efficient services ; and the defendant proposed to prove that Mr. Fuller had not performed services in any degree adequate to a compensation of \$ 10,000 ; but such evidence was considered to be immaterial and irrelevant.

A nonsuit or a default was to be entered, or a new trial ordered, as the Court should deem proper.

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Farley and Choate, for the plaintiffs, argued, among other things, that the agreement between Mr. Fuller and the defendant was not against public policy ; that the agreement recited, that Mr. Fuller was of opinion that the rail road ought to terminate on the lands of the South Cove Corporation, and this fact, therefore, the defendant could not controvert ; that the

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law would intend that the aid of Mr. Fuller in procuring the depot to be located there, was to be rendered in a proper and lawful manner ; that it would be mutually beneficial to the South Cove Corporation to make, and to the rail road corporation to receive, the proposed donations ; that the rail road corporation was a private corporation, invested with authority to make its own selection of a place for a depot, and in doing so it might lawfully take into consideration the comparative expense of different locations ; that, however, the interests of the corporation in this respect were identical with those of the public ; and further, that the act incorporating the South Cove Corporation, in § 6, expressly authorized the precise thing to be done which Mr. Fuller undertook to do, and this shows that it was not against public policy ; that it was competent and fair for the defendant to enlist other persons to unite with him in procuring the rail road depot to be established on the South Cove, and, if so, it was competent to him to employ an agent for the same purpose ; that Mr. Fuller never pretended to act otherwise than as an agent with compensation, neither did he engage to say or do any thing to mislead the public, in getting up the South Cove association ; that there was no understanding between him and the defendant, that the agreement should be kept secret ; that it was not known that Mr. Fuller was to be a stockholder in the South Cove Corporation, and he was in fact one of the last subscribers for shares, so that he was not a decoy duck to induce others to subscribe ; that as a member of the rail road corporation he had no voice in selecting the place for a depot, but merely in choosing directors ; and that although he was a member of the legislature, yet at the time of making the agreement that body had adjourned and could not be reassembled except by an extraordinary act of the governor, and if Mr. Fuller had contracted to obtain an act of incorporation for the South Cove association, it was in reference to a future legislature of which he would not be and was not a member. *Richardson v. Mellish*, 2 Bingh. 242 ; *Lamp-leigh v. Brathwait*, Hob. 105 b ; Chit. Contr. 217 ; *Harrington v. Klopprogge*, 2 Chit. Rep. 475.

Fletcher and Mann, for the defendant, insisted that the contract was against public policy ; *Chesterfield v. Jansen*, 1 Ark.

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352 ; *S. C.* 2 Ves. Sen. 125 ; 1 Story on Eq. 262 ; *Collins Blantern*, 2 Wils. 347 : —

1. Because it was founded on a violation of a public trust and confidence, Mr. Fuller being a member of the legislature at the time when the contract was made ; 1 Story on Eq. 291 ; *Cooth v. Jackson*, 6 Ves. 12 ; *Pingry v. Washburn*, 1 Aikens, 264 ; *Swayze v. Hull*, 3 Halsted, 54 ; *Jones v. Randall*, 1 Cowp. 39 ; —

2. Because the object was to procure a grant, in the nature of an office ; *Meredith v. Ladd*, 2 N. Hamp. R. 517 ; 1 Story on Eq. 292, 293 ; —

3. Because it was a promise to pay money for influencing a public officer, the rail road corporation being in effect a public officer, and it being their duty to select a depot in reference to public convenience and accommodation ; —

4. Because it was an agreement for the exertion of a secret influence and power over third persons, inasmuch as any representation made or opinion expressed by Mr. Fuller to the rail road corporation, would have the greater effect from its being supposed that he was acting as a stockholder, having a common interest with the other stockholders, when in fact he was acting under this agreement ; and in this respect there were seven classes of analogous cases : — 1. Of contracts for procuring a will to be made in favor of the promisor ; *Debenham v. Ox*, 1 Ves. sen. 276 ; 1 Story on Eq. 266 ; — 2. Of puffers at auctions and agreements not to bid in competition ; 1 Story on Eq. 290 ; 2 Kent's Com. (1st ed.) 426 ; *Gulick v. Bailey*, 5 Halsted, 91 ; *Thompson v. Davies*, 13 Johns. R. 112 ; — 3. Of poundage for recommending customers to buy ; *Hughes v. Staham*, 4 Barn. & Cressw. 187 ; *Wyburd v. Stanton*, 4 Esp. 179 ; — 4. Of marriage brokerage bonds ; Story on Eq. 267 to 271 ; *Keat v. Allen*, 2 Vern. 588 ; *Boynton v. Hubbard*, 7 Mass. R. 118 ; — 5. Of *post obit* bonds ; *Boynton v. Hubbard*, 7 Mass. R. 119 ; 1 Story on Eq. 334 ; — 6. Of compositions with creditors and secret preferences ; *Cockshott v. Bennett*, 2 T. R. 763 ; Chit. Cont. 225, 226 ; *Wood v. Roberts*, 2 Stark. Rep. 417 ; *Jackson v. Duchaire*, 3 T. R. 551 ; 1 Story on Eq. 370, 371 ; — and 7. Of concealment in representations to underwriters.

SHAW C. J. delivered the opinion of the Court. The plaintiffs bring their action as indorsees of a promissory note ; but as they took the note by indorsement after it had become due, they are presumed to have taken it with notice of the consideration, and of all the circumstances under which it was given ; it is open, therefore, to the same defence, as if the suit were prosecuted in the name of the promisee.

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It appears by the case reported, that the note was not originally delivered to the promisee, but to third persons, to hold and deliver the same to the promisee, upon a condition expressed in an agreement of even date with the note and signed by the parties. The agreement and the note, therefore, being made at the same time, and relating to the same subject, are to be taken together, as different parts of one and the same transaction, to the same effect as if the stipulations in both had been incorporated into one instrument. This agreement states the consideration upon which the note was made, and discloses the object of the parties and the purposes of the transaction. Several grounds of defence were taken to this action :

First, that the note was given without any legal consideration ;

Second, that it was made deliverable to the promisee, and payable, upon a condition precedent, to wit, the actual location and making of the principal depository of the Worcester Rail Road Corporation, at the place desired and designated, which condition, it was insisted, had not happened, at the time of the commencement of this action ; and .

Third, that the object, tendency and effect of this contract, was to induce the promisee, or other persons to be employed and called into action by him, to exert an influence upon the decision of questions affecting both public and private rights, with a view to considerations, other than those affecting those rights ; that such contracts tend injuriously to affect the rights and interests of third persons, are contrary to public policy, and so inoperative and void in law.

Upon the last ground, the Court are of opinion that this contract was obviously contrary to public policy, to open, upright and fair dealing, and cannot, therefore, in point of law, be supported. At the time when this contract was entered into, the

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Boston and Worcester Rail Road Corporation had been incorporated, with ample powers ; the *termini* of the road were not definitively fixed, otherwise than at Worcester and Boston, but at no particular places within those towns respectively. At that time Mr. Fuller was a proprietor in the rail road corporation, and he was then a member of the Massachusetts legislature, though he was not a member the ensuing year, when the South Cove company was incorporated. After the agreement, the South Cove company was incorporated, with a large capital, and Mr. Fuller became a member and stockholder in that company.

We think, in the first place, that this cannot be regarded as a contract and payment for professional services. Nothing in the terms of the agreement, or in the nature of the objects to be accomplished, indicates that the promisee was to act as the advocate and counsel, or as the accredited agent and attorney of Mr. Dame, in procuring any of the acts done, upon the accomplishment of which the money was to be paid. The acts to be done were to get up a large joint stock company to procure the Worcester Rail Road Corporation, either by the aid of such a company or otherwise, to fix its place of termination and deposit at the place desired by Mr. Dame. The interest of Mr. Dame, to be subserved by this location, was incidental and collateral, and not in any sense the object or purpose of so fixing that location, so far as either the rail road corporation or the South Cove Corporation were concerned. It was not a case, therefore, in which Mr. Dame had any right, or any occasion, to be heard by counsel, or to be represented by a known and accredited agent. The fullest and freest latitude ought to be given, for all persons interested, in matters of property, character, and generally in their social rights, to be heard by their counsel, before public bodies, as well as before judicial tribunals, in all cases where those rights are drawn in question ; but then the fact appearing that persons do so act in a representative capacity and appear as counsel for others, prevents any injurious effects from such proceeding. Such counsel, agent or attorney is considered as standing in the place of his principal, governed solely by a regard to his interests, and his arguments and representations are weighed and considered accordingly.

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Again ; the Court are of opinion, that this does not stand upon the ground, that the promise is void, because it was given to induce the person to whom it was made, to do an unlawful act. It is an undoubted principle of law, that where a promise is made to one, in consideration of doing an unlawful act, as to commit an assault, or practise a fraud on a third person, such promise is void in law. It was strongly pressed by the counsel for the plaintiffs, that when a contract is made in general terms, broad enough to include things lawful and unlawful, it shall be presumed that they intended those only which were lawful. For instance, if A should stipulate to procure and obtain from B a sum of money for the use of C, it might be obtained by a demand or a suit at law, which are lawful means, or by fraud or violence, which are unlawful. It should be presumed that the lawful and not the unlawful means, were intended. If this defence were placed solely upon the position, that this was a contract void on the ground of containing stipulations to do unlawful acts, this would be a cogent and perhaps an unanswerable argument in reply.

But this is not the true nature of the defence. The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do or cause the doing of unlawful acts ; it avoids contracts and promises made with a view to place one under wrong influences, those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons. A person having property, and being of sound mind, may make a will in favor of whom he pleases. A common friend may lawfully represent to him, the expediency and fitness of making a bequest in favor of a particular individual and may repeat that representation, both in conversation and in writing. Writing letters at the request of another and for his benefit, would under ordinary circumstances, be a proper consideration for a promise of compensation. But any promise to pay another for soliciting a will in his favor, would be void. *Delenham v. Ox*, 1 Ves. sen. 276. A man might entertain a very sincere opinion, that a marriage between a certain gentleman of his acquaintance, and a lady of considerable fortune, would be highly beneficial and contribute to the happiness of both parties, and he might lawfully propose this to

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one or both. But any promise of reward made to him to induce him to do this, or any promise made afterwards in consideration of such service, would be void.

This is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested, and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of disinterested good offices, and the measure proposed, to be recommended, by the unbiased judgment of the person offering it; whereas, it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it, or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief.

The case in question is, we think, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of opinion, that it was contrary to public policy, and to upright and fair dealing, as it tended injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Worcester rail road, for the accommodation of the public travel; 2. As it affected the interests of the proprietors of the Worcester rail road; 3. As it affected the interests of the joint stock company incorporated under the name of the South Cove Corporation.

The Boston and Worcester rail road was established for public accommodation and convenience, in the transportation of passengers and merchandise. Like a county road, it was in many respects a common highway. It has been so held in case of turnpike roads. *Commonwealth v. Wilkinson*, 16 Pick. 175. It may be said, that it was to be constructed and located by the corporation. True, as in case of a turnpike road,

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it is constructed in the first instance at the expense of a private company of adventurers, under the sanction of the legislature, incorporated for that express purpose, and they are to be reimbursed by a toll, levied and regulated by law for their remuneration. The work is not the less a public work ; and the public accommodation is the ultimate object. It is also true, that it was left to the corporation and the directors, to fix the termination and place of deposit. In doing this a confidence was reposed in them, acting as agents for the public, a confidence which, it seems, could be safely so reposed, when it is considered, that the interests of the corporation as a company of passenger and freight carriers for profit, was identical with the interests of those who were to be carried, and had goods to be carried, that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connexion with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation, such undue influence, has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests, to be affected and controlled by considerations having no regard to such interests. It is no answer to say, that by the act of incorporation the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with the directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location ; and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended upon the decision of this question by the directors

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Nor is it any satisfactory answer to say, that when the agreement was entered into, he had come to the opinion that the location in question was the best for the interests of the public, and for the interests of the corporation. That opinion might be changed by new views, and new offers; and besides, the terms, upon which this boon was to be obtained, was still an open question. But upon all these questions the influence of the promise of separate and distinct advantage, deprived him of the power of exercising a free, disinterested and unbiased judgment.

2. It was contrary to public policy, and the principles of fair dealing, as it affected the private interests of the two companies. Mr. Fuller was one of the original proprietors of the Worcester rail road. His associates had a right to believe, that in all his acts as such stockholder, in choosing directors, in framing by-laws, and doing other acts, pursuant to the powers of the corporation, he had a common, and in proportion to his shares, an equal interest, and they had a right to rely on his judgment, his recommendations of directors and other acts, with all the confidence inspired by such a belief. A contract assuring him separate and distinct advantages, operated to mislead and deceive them, and thus had a tendency to operate as a fraud upon them. It is not easy to distinguish this from the case of a composition deed, where ostensibly all the creditors stipulate to release the common debtor upon the payment of their debts at a certain rate of discount; any stipulation for a separate and distinct advantage, is held to be a fraud upon other creditors, and void. *Case v. Gerrish*, 15 Pick. 49.

3. The same considerations apply to the case of Mr. Fuller as a member and stockholder in the South Cove Corporation, by whose act, by contract with the Worcester Rail Road Corporation, the location of the depot was to be fixed. It is no objection to the force of this argument, that this company was not incorporated until after the agreement was made, and that Mr. Fuller did not at first become a member of it. It is obvious, that the establishment of such a company, was contemplated when the agreement was made, and that there was nothing in the agreement to prevent Mr. Fuller from becoming a member, as he in fact did. The members of this company

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had a right to have the question, whether they should contract with the Worcester Rail Road Corporation and the terms on which they should so contract, settled and decided by a sole regard to the interests of that corporation as a company of owners, purchasers and adventurers. Any influence from any quarter, created by the promise of a sum of money, to induce them so to contract, and to yield to particular terms, with a view to separate and extraneous interests, operated as a fraud upon them, and rendered such promise void.

If these principles are important to be observed in the ordinary intercourse of society, and in regard to the conduct of individuals in their important relations, such as wills and marriages, it seems to us *a fortiori* that they are required to be observed in the formation and conduct of associations, corporations and joint stock companies, where very large and important interests are confided and administered, where most important questions are decided, directly or indirectly, by the major vote of the associates, and where the judgment of each is, to a great degree, affected and influenced by the judgment and conduct of others. It seems to us that the strictest good faith, and purity of intention and purpose are absolutely requisite.

We are aware that there is no stipulation in this contract, that it should be kept secret. There is certainly no intimation that it should be disclosed to either of these companies, or otherwise made public. The contract was of such a nature, that it would be likely to defeat its purpose to make it public, it is therefore reasonable to presume that it was not intended to be made public. In point of fact, it does not appear that it was known to any one, but the parties interested and the depositaries of the note and agreement, until after the object was accomplished. But it is enough for the purposes of the present argument, which goes to establish a general rule, that such agreement might be kept secret, from all those on whom the influence was intended to be exerted, and that in general it would be for the interest of the parties to keep it secret, and thus that it would be productive of all the injurious consequences alluded to.

If one stockholder in a joint stock company or one not a

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stockholder, can be furnished with the means of paying a bonus or premium upon shares, paying the differences between ostensible sales of shares and the real value, he may create a fictitious value to shares, promote a false confidence in the stability and measures of such company, and thus produce injurious consequences to a great extent.

It is obvious, that if one large landholder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great landholders may make like promises, on similar conditions, and great public works, which should be conducted with a view to the public interest, and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked, and sacrificed in a mercenary conflict of separate, local and private interests.

Plaintiffs nonsuit.

THE ANDOVER AND MEDFORD TURNPIKE CORPORATION, Petitioners &c. *versus* THE COUNTY COMMISSIONERS OF MIDDLESEX.

Where a turnpike road is, by the assent of its proprietors, laid out by the county commissioners as a free public highway, (pursuant to St. 1833, c. 147 ; Revised Stat. c. 39, § 16 *et seq.*.) the commissioners' allowance of damages to such proprietors is conclusive upon them and not subject to revision by a jury.

March 14th,
1837, at
Boston.

THIS case was argued by *Greenleaf* and *A. Bartlett*, for the petitioners, and by *Choate*, for the respondents. The material facts are stated in the opinion of the Court, delivered by

March 20th,
1837.

SHAW C. J. A question of considerable importance to the community, arises upon this petition. It is a petition to this Court for a writ of *mandamus* to the county commissioners, requiring them to issue their warrant to summon a jury to assess the damages to the petitioners, upon taking their turnpike road as a common highway. The state of the question is plain and simple. Application was made to the county commissioners, pursuant to Stat. 1833, c. 147, to lay out that portion of the

Andover and Medford turnpike road, which passed through the towns of Reading, Stoneham and Medford, as a common highway. The proprietors of the turnpike road and the three towns concerned, by their respective corporate acts, expressed their assent to the measure, and the county commissioners had, by the terms of the statute, jurisdiction of the subject, and authority to lay out that turnpike road for a highway, as prayed for. The commissioners allowed to the proprietors of the turnpike road the sum of \$ 3000 as damages. The proprietors feeling themselves aggrieved by the insufficiency of this allowance, seasonably applied to the commissioners by petition, to award a jury to assess their damages, which the commissioners declined doing, on the ground that their allowance was conclusive.

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The question is, whether under the statute, the proprietors are entitled to have this allowance of damages revised by a jury, as in the ordinary case of a person whose land is taken for a common highway.

This authority to the commissioners to change a turnpike road into a common, open and free highway, is comparatively a recent enactment, growing apparently out of a peculiar and novel state of things. It was first given by St. 1827, c. 77, § 14, providing for the appointment and regulating the proceedings of county commissioners. It was not the sole and principal subject of the act. It probably originated in the well known fact, that many turnpike franchises had become of no value, and in some instances the cost of supporting the road exceeded the income, so that the franchise was a burden instead of a benefit. The statute provided, that whenever a turnpike corporation should *make application* setting forth their desire to relinquish and abandon their franchise, as to the whole or any part of the road, which they were bound to support, the county commissioners should have jurisdiction, and might lay out, alter or vary the same as they should judge expedient. It then provided, that in the assessment of damages they should allow to any person or corporation injured thereby, such damages as they would be justly entitled to receive, over and above the injury sustained by the continuance of the same as a turnpike road and no more, deducting the advantage, and there-

Andover and Medford Turnp. Corp. upon the corporation was exempted from further responsibility for the road so taken.

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sioners of
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It is very manifest, that in this act no damages were to be awarded to the proprietors of the turnpike road ; they are deemed a party benefited, not a party injured. Further, the damage is to those over whose land the road passes, for the excess of damages, &c. or those whose lands might be taken for alterations. The great object was, to give the commissioners jurisdiction to accept a surrender of the franchise for the public, and do such other acts as might be proper to make such surrender effectual and beneficial to the public. No provision was made in this act, for the assent of towns ; but when such roads were lawfully made highways, the liability of towns to support them would arise under the general law.

So the law stood, until the act was passed under which the question now arises, *St.* 1833, c. 147. By this act the county commissioners were authorized upon application to them made, (not by the turnpike proprietors necessarily,) to lay out the whole or any part of a turnpike road as a common highway, when in their judgment common convenience and necessity should require it. But this can only be done by the assent of the proprietors, and of the towns who are to become responsible for the support and repairs of the road. The arrangement is, therefore, in some measure, in the nature of an agreement between the parties most interested, made under the superintendence of the commissioners, who represent the county, and who are authorized to apportion the expense upon and amongst the county and the towns interested.

The second section then provides, that the commissioners have power to allow to the turnpike corporation, such damages as they shall think reasonable and just, to be paid out of the county treasury, and to order a part of said damages, not exceeding one half, to be charged upon and apportioned amongst the towns through which the road passes.

The Court are of opinion, that here was an authority given to the commissioners which was definitive, and that their allowance was intended to be conclusive.

In the original act no damage was to be allowed to the proprietors. The acceptance of their franchise. and the discharge

from their obligations, was deemed a boon. The franchise, though it might have cost them a large sum of money, was deemed worthless.

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But the subsequent act seems to have contemplated a case, where the tolls may be barely sufficient to keep the road in repair, where however it would be of some little value to the proprietors, but where it would be the manifest interest of the proprietors to expend as little as possible in repairs, merely enough to make it passable. It might be for the public interest to pay the proprietors something, and put the road at once under the care of the towns, who would be induced by considerations of interest and public spirit, to keep it in the best repair, and find their recompense in the increased travel, which good and free roads are found to encourage.

There was no danger that this authority would be used oppressively, because it could only be exercised by the assent of the proprietors, and this power of giving or withholding their consent, is an ample security to them.

The language used in this section is not such as is commonly used, when parties injured are to be compensated. The commissioners are not to assess such damage as they have sustained ; this might be claimed to be the whole cost of the road. They are to allow the proprietors such damages as they should think reasonable and just. It reposes a confidence in them, having a regard to the reasonableness and justice of the case, of which they are made judges.

Further, the case is manifestly distinguishable from ordinary cases of laying out highways, over the lands of owners, without their consent, in this ; that it is rather a matter of convenience and expediency than of necessity. The words of the adjudication, "common convenience and necessity" are used, but this is rather in conformity to the language commonly used, than to its strict applicability. The highway cannot be said to be one of *necessity*, because the public already have the full benefit of it as a highway. It is rather a question of expediency and policy, whether it is best to continue to pay toll, and require the proprietors to keep it in repair, or to obtain the benefit of a free road, and let the public repair. Such a question depends mainly upon the terms on which the change

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can be made, and this again upon the question, whether it yields any considerable income to the proprietors, and whether on its voluntary extinguishment it would be reasonable and just to make them any allowance and what. This question it was intended to submit to the judgment of the commissioners, acting for the public.

The argument mainly relied on for the petitioners, is derived from the terms of the fourth section, which provides that all proceedings in the laying out of any road, in pursuance of the act, shall be in conformity with the provisions of law for laying out common highways. It is contended, that as these acts give a right to have a jury to revise the assessment of damages, it was intended to be allowed in the present case. Had it appeared from the whole statute taken together, that it was intended that damages should be assessed to all persons, whose property might be affected by the establishment of these highways, including the proprietors of the turnpike road, without distinction, there would be much force in this argument, and as it is, we think that if in laying out a turnpike road into a common highway, any alterations should be made, and thereby the land of other persons should be taken, this last section would be broad enough to warrant the commissioners in assessing damages, and in granting a jury to revise them, in case the party should require it. It would come within the common case of the property of an individual, taken for public use, by the public, in virtue of its right of eminent domain, to which the assent of the owner is not necessary. But taking the provisions of the second section, and considering it manifest, that it was not the intention of the legislature to provide for a general assessment of damages for the proprietors, but only for a reasonable allowance, at the judgment of the commissioners, and the whole proceeding being with the consent of the proprietors, we think that no constitutional provision required the legislature to provide for the trial by jury; and that the very general words in the fourth section were not intended to control the special powers in the second.

It was urged in argument, that trial by jury is favored, and when the right is doubtful, in the terms of the statute, such construction should be adopted as to favor it. This is undoubtedly

true, except in cases where by the actual or implied assent of the party another mode of trial is provided.

But it was further urged, that this circumstance of assent, does not so much vary the case, because in cases where individuals are petitioners for laying out a road over their own lands, they are as much entitled to a jury to assess their damages, as those whose lands are taken without their request and against their consent. This is undoubtedly true, but it is because the statute, in terms gives them this right. But if an act were passed, that when on the application for a highway, all the persons over whose lands it is proposed to make it, petition for it, the commissioners shall allow them such damages as they think reasonable upon a balance of advantages and disadvantages, without any provision for having that allowance revised by a jury, I know of no principle upon which such a law could be held to be an infringement on the right of trial by jury.

In some of the earlier statutes, after the adoption of the constitution, where, on the grant to build bridges, and otherwise, private property was authorized to be taken for public use, and where it was provided that damages should be determined by commissioners, without any provision for an assessment by jury, it was considered to be contrary to the provision of the constitution, and that the party whose property was taken without his consent was entitled to a trial by jury. *Chadwick v. Proprietors of Haverhill Bridge*, 2 Dane's Abr. 686. But this was founded solely on the consideration, that the property of the party was taken without his consent, and that he was not bound, without his consent, to conform to an assessment not made by a jury. But when an assessment by referees or commissioners is provided for, by consent, it is held to be as binding and conclusive as an assessment by jury. Indeed in most of the acts respecting public highways and turnpike roads, there is a provision that damages shall be definitively assessed by a committee, if the parties so agree.

We think this construction is confirmed by the provisions of the Revised Statutes, where these several statutes have been condensed and reenacted. It does not seem to have been the intention of the revising commissioners or of the legislature, to

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alter the law, but to render the existing provisions somewhat more clear. By the language used, and the collocation of the several provisions, we think the construction which we have adopted, is the construction of the Revised Statutes. Revised Stat. c. 39, § 16, 17, 18, 19.

Petition dismissed.

**PATRICK M'CAFFREY *versus* MICAH G. MOORE
and Trustee.**

Where an action was referred under a rule of court, to referees, whose award was to be final, and an award was made in favor of the plaintiff before the service of a trustee process against the plaintiff as principal and the defendant as his trustee, it was *held*, that as the defendant had no opportunity to plead this attachment in bar of the first action, he was not chargeable as trustee.

THE answer of Richard Farwell, made at June term, 1834, of the Court of Common Pleas, set forth, that previously to the service of the writ, the defendant and Oliver N. Shannon, who, as the respondent supposed, were partners, commenced an action against the respondent and Silas Temple, to recover a debt alleged to be due from them jointly, on a building contract; that this action was referred, under a rule of court, to referees, whose award was to be final; that, in the autumn of 1833, the referees met, and, after hearing the parties, awarded to the defendant and Shannon the sum of about \$ 350; that exceptions were taken to the award; and that at the June term 1834, of the Common Pleas, after the service of the trustee process, the award was accepted, and judgment rendered thereon for the sum of \$ 350.

Shannon was summoned as trustee of the defendant in an other action; and by the consent of parties his answer in that action was to be taken as the answer of the respondent in the present action. By this answer it appeared, that there was no balance due to the defendant from Shannon, and that the amount of the award was insufficient to discharge the partnership debts still due, and to indemnify Shannon for what he had paid on the partnership account.

F. Hilliard, for the plaintiff, to the point, that the award was not a bar to the trustee process, cited *Gridley v. Harra-den*, 14 Mass. R. 496 ; *Thorndike v. De Wolf*, 6 Pick. 123 ; *Eunson v. Healey*, 2 Mass. R. 32 ; *Sharp v. Clark*, 2 Mass. R. 91 ; *Howell v. Freeman*, 3 Mass. R. 121 ; *Prescott v. Parker*, 4 Mass. R. 170 ; *Kidd v. Shepherd*, 4 Mass. R. 238 ; *Foster v. Jones*, 15 Mass. R. 135 ; Report of the commissioners to revise the statutes, c. 109, § 30, and note ; that judgment on the award might be stayed permanently by reason of the trustee process, *Winthrop v. Carlton*, 8 Mass. R. 456 ; and that the service of the trustee process might be pleaded *à puis darrein continuance*, in the action brought by the defendant and Shannon, after judgment was rendered on the award, *Watkinson v. Inglesby*, 5 Johns. R. 392 ; *Mechanics' Bank v. Hazard*, 9 Johns. R. 392 ; *Ridford v. Brown*, 10 Pick. 30 ; *Bowne v. Joy*, 9 Johns. R. 221 ; *Pell v. Pell*, Cro. Eliz. 101 ; *Babington v. Babington*, Cro. Eliz. 157.

Robinson, *contra*, cited, on the first point, *Howell v. Freeman*, 3 Mass. R. 121.

SHAW C. J. delivered the opinion of the Court. The question is, whether the respondent, Farwell, is liable to be charged on his answers as the trustee of the defendant, Moore. From these answers it appears, that the respondent and another were indebted to Moore and another person, jointly, upon a building contract. The relation between Moore and Shannon, the other person, is more fully set forth in the answer of Shannon, in another suit, in which he was summoned as the trustee of Moore, and which answer, by consent of the parties in the present case, is to be taken as the respondent's answer in this case. In that answer it appears, that Shannon claims the whole amount of the debt due from Farwell and Temple, as being due to himself, as a copartner, upon an adjustment of accounts between himself and Moore. It also appears, that before this suit was commenced, and the respondent served with process, a suit was commenced by Moore and Shannon against the respondent and Temple jointly, which had been referred to referees under the usual rule ; that their award was to be final and judgment entered upon it ; and that the referees had made their award, before the trustee process was served.

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and Tr.
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April term
1836, at
Concord.

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With the limited means, which the trustee process affords of inquiry into facts, in order to understand the precise relation of two or more, claiming to be copartners or otherwise jointly interested in the debt attached, where it is so attached to answer the separate debt of one of them, it is often not easy or perhaps possible to come to a correct or satisfactory conclusion. But so far as the facts are disclosed in the present case, it would be difficult to say that there was any balance due to the principal defendant, capable of being attached as his several debt, whether there was a general partnership between him and Shannon or not, if upon their joint dealings, as far as they went, there would be no balance due to the principal defendant, upon settlement and adjustment of an account ; and this is distinctly stated in the answer of the partner, Shannon. But the Court have not thought it necessary to pursue this inquiry, or to give any opinion upon this part of the case, because upon the other ground, the Court are all of opinion, that the trustee must be discharged.

It has been held as a reasonable construction of the statute giving this process, the statute itself having made no express provision on the subject, that where a creditor has instituted legal proceedings for the recovery of his debt, and has made such progress therein, that the attachment of the debt cannot be pleaded in bar of the writ, the attachment is too late and cannot hold. It results from that clause of the statute which provides that such attachment may be pleaded in bar. *Kidd v. Shepherd*, 4 Mass. R. 239. When parties have referred their cause under a rule, which makes that reference conclusive, and enables the plaintiff to take judgment upon the award when returned, the defendant has no day in court to plead the attachment in bar, and therefore the attachment cannot hold. *Howell v. Freeman*, 3 Mass. R. 121. This case falls within the same principle, and it is decisive.

Trustee discharged.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF PLYMOUTH, BARNSTABLE, BRISTOL
AND DUKES-COUNTY, OCTOBER TERM 1836,
AT TAUNTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

THOMAS CHAMBERLAIN *versus* SUSANNAH DOTY
et al.

The extent of an execution upon an estate for life, is not rendered invalid by the circumstance, that the reversioner acted as one of the appraisers.

Where an execution was extended upon real estate, and the certificate of the appraisers and the return of the officer, indorsed on the execution, recited, that the appraisers were "duly sworn," but it did not appear from such certificate and return, that they were sworn before any justice of the peace, it was *held*, that the extent was invalid.

THIS was a complaint instituted under *St.* 1825, c. 89, to recover possession of certain real estate.

Marston, for the complainant.

Oct 25th

Miller, for the respondents.

SHAW C. J. delivered the opinion of the Court. The question is upon the validity of the levy of the complainant's execution.

Oct. 28th

Chamberlain
v.
Doty.

The first exception is, that the estate levied upon was a life estate, and it is alleged that one of the appraisers was tenant of the estate in reversion. This exception cannot be sustained. He had no interest in diminishing or enhancing the estimated value of the life estate, which was wholly independent of the reversion; he had no more interest in purchasing in the life estate than any other freeholder; nor would a false appraisement aid him in such purchase.

The other exception, however, is fatal to the levy. Where, according to the usual practice, the certificate of the magistrate who administered the oath, and that of the appraisers who made the appraisement, are indorsed on the execution, courts have gone very far, in considering these certificates in connexion with the officer's return, and as aiding any defects in the return itself. *Williams v. Amory*, 14 Mass. R. 28. But it nowhere appears in the present case, either from the officer's return or from the accompanying certificates, that the appraisers were sworn before any justice of the peace or magistrate. Both in the certificate of the appraisers, and the return of the officer, it is simply recited, that they were first "duly sworn." The Court are all of opinion, that upon the current of authorities, this is not sufficient to show a compliance with the requirements of the statute, and to pass the estate by force of the levy. *Davis v. Maynard*, 9 Mass. R. 242; *Wellington v. Gale*, 13 Mass. R. 483; *Howard v. Turner*, 6 Greenleaf, 106.

Complainant nonsuit

ALANSON STACEY *versus* DAVID BENSON.

Oct. 29th.

In this case it was *resolved*, that under St. 1783, c. 38, § 7, providing, that where any person, by excessive drinking, &c. shall endanger or expose "*the town to which he belongs*" to expense for his maintenance, the selectmen thereof shall make complaint to the judge of probate of the county to which the person *belongs*, and authorizing such judge thereupon to appoint a guardian to such spendthrift, the appointment of a guar-

dian upon the complaint of selectmen of the town where the spendthrift was *domiciled*, was valid, although such spendthrift had his *legal settlement* in a town in a different county from that in which such appointment was made.

Stacy
v.
Benson.

Mann and *S. Williams*, for the plaintiff.

Warren, for the defendant.

[In the Revised Statutes, c. 79, § 11, the matter is put beyond doubt, the authority being conferred on the selectmen of the town of which the spendthrift is an inhabitant, or in which he resides.]

JOSEPH E. READ *versus* JOHN BAYLIES.

An assignment by partners, of their joint and several property, in trust for each of their joint and several creditors as should become parties thereto, is valid as against an attaching joint creditor, if the amount of the demands of the joint creditors, who had become parties before the attachment, is sufficient to absorb all the property assigned.

REPLEVIN for certain property assigned to the plaintiff. The trial was before *Morton J.*

It appeared, that Joseph E. Read junior and Paddock R. Read, who were in partnership, under the firm of Joseph E. Read Jr. & Co., assigned their joint and several property to the plaintiff, in trust to sell the same and to apply the proceeds, after defraying expenses, &c. to the payment of the claims of the plaintiff and Abraham Bowen, and of such other creditors as should become parties to the assignment; that Joseph E. Read junior was indebted severally to Bowen, at the time of the execution of the assignment, in the sum of about \$100; that after the property had been delivered to the plaintiff, and the assignment had been executed by creditors of the firm, whose claims amounted to a larger sum, than the value of the property assigned, the defendant, who was a deputy sheriff, attached the property by virtue of a writ issued against the firm, in favor of William H. Allen.

It further appeared, that, on the day before the assignment was executed, two notes were signed by Joseph E. Read Jr. & Co., as principals, and the plaintiff and Bowen, as sureties,

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v.
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for the sum of \$ 1500 each, and substituted for two notes previously given for the same amount, but signed by Joseph E. Read junior as principal, and the plaintiff and Bowen, as sureties, the substituted notes being antedated so as to conform to the original notes ; that the original notes were given for debts due from a former firm of which J. E. Read junior was a member ; and that P. R. Read, upon becoming a partner of J. E. Read junior, had agreed to pay one half of the notes.

If the Court should be of opinion, that the plaintiff was entitled to recover, the defendant was to be defaulted ; otherwise, the plaintiff was to be nonsuited.

Oct. 23d.

Coffin and Clifford, for the defendant, cited *Harris v. Sumner*, 2 Pick. 129 ; *Phillips v. Bridge*, 11 Mass. R. 242 ; *Goodwin v. Richardson*, 11 Mass. R. 469 ; *Peirce v. Jackson*, 6 Mass. R. 242 ; *Fisk v. Herrick*, 6 Mass. R. 271 ; *Widgery v. Haskell*, 5 Mass. R. 144.

Warren, Battelle and Williams, for the plaintiff, cited *Adams v. Paige*, 7 Pick. 548 ; *Ridley v. Taylor*, 13 East, 180 ; *Andrews v. Ludlow*, 5 Pick. 28.

Oct. 29th.

SHAW C. J. delivered the opinion of the Court. This is a question of property. The defendant, as a deputy sheriff, attached the goods as the property of Joseph E. Read Jr. & Co. ; and the plaintiff claims under a previous assignment, made to him as trustee for the creditors of the same firm. The plaintiff, therefore, must prevail, unless this assignment can be shown to be void against an attaching creditor. And the question here is, whether it is fraudulent upon its face, so that a court can declare it void ; because, if it were a question depending upon intent or purpose, not apparent upon the instrument itself, it would be a question of fact, to be tried by a jury.

One ground, on which it is contended that this assignment is fraudulent, as against the partnership creditors, is, that shortly before the assignment, two notes for \$ 1500 each, were made in the partnership name, and were signed by Read senior and Bowen as sureties, which were given in the place of two notes for the like amount, previously given by one of the partners only, and antedated, to conform to those previous notes. If these facts stood alone, they would be sufficient to excite suspicion of unfairness, and would be proper to lay before a jury

as evidence of fraudulent intent. But the facts agreed explain the transaction, and rebut the charge of fraud against the partnership creditors. It is agreed, that though the notes were given by one of the partners, they were for a partnership debt, and that Paddock R. Read, the other partner, on coming into the firm, had agreed to consider these partnership debts, and to pay his proportion of them as such.

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The principal ground relied upon by the defendant, to impeach this assignment, is, that it purports to be an assignment both of partnership property, and of several property of the partners ; and it provides, that the proceeds shall be distributed amongst both partnership creditors and several creditors. But this circumstance alone is not sufficient to invalidate the assignment ; to have that effect, it must be shown on the part of the attaching creditor, attaching as the creditor of the firm, that these provisions in the assignment would operate injuriously to him. But it appears from the facts in the case, that the amount of the claims of partnership creditors, who had become parties to the assignment before the attachment, were more than sufficient to absorb all the partnership property assigned. The debtors, by their voluntary conveyance, had a right to convey their partnership property, at a fair valuation, to pay such of their partnership debts as they chose to prefer, and under this right to prefer, they might well prefer those who would come in and become parties. Such an assignment would be good and effectual against all other partnership creditors, who should attach the property, because the creditors under the assignment had an equal right with those attaching, to rely on the principle, that partnership property shall be first applied to the payment of partnership debts, and to obtain a preference, and being first in time, claiming under a good conveyance, made to trustees for their use, upon a good consideration, their title is prior in right. An attaching partnership creditor, then, has no right to complain, that the partnership creditors under the assignment, have consented to let in several creditors to share with them, because such a provision does not affect the rights of such attaching creditors. The partnership creditors under the assignment would hold the whole of the property against an after attaching partnership creditor, because the whole would be no more than sufficient to satisfy their debts ; and, therefore, whether they

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permit several creditors to come in and share with them or not, is wholly immaterial to other creditors. It is solely a question under the assignment, between the different classes of creditors, when they come to claim distribution, a question with which those claiming adversely to the assignment can have no concern. It may be likened to a case, where a debtor, owing more than he is able to pay, makes an assignment, with the usual stipulation, that all creditors who shall become parties within a limited time, shall have equal shares in the proceeds. Suppose the debts are \$30,000, the value of the property, \$10,000, and creditors to the amount of \$12,000, execute the assignment. Then an attachment is made, and afterwards within the time limited, creditors to the amount of \$10,000 more, become parties. Inasmuch as creditors to an amount exceeding the value of the property had become parties before the attachment, and inasmuch as, under the right of preference, these would have a right to hold the whole of the property against an attaching creditor, it cannot operate injuriously to such attaching creditor, that the preferred creditors under the assignment have consented to a stipulation, that those other creditors shall come in and share with them, the proceeds of the assigned property, although such other creditors should not thus become parties until after the attachment. It is a question merely amongst the parties to the assignment, how the proceeds shall be distributed, and does not affect the validity of the assignment as against other creditors not parties, who would attach the property and claim to hold it against the assignees.

There may be a question upon this assignment amongst the parties to it, whether, upon a distribution of the proceeds, the partnership property shall not first be applied to the payment of partnership debts, and the several property to pay several debts. This may be affected by the terms and stipulations of the instrument, that may constitute the rule which the parties may have made for themselves, and by which they might well modify and regulate their existing legal rights. We have not looked at this instrument with that view; nor is it necessary, for the reasons already given. The Court are of opinion, that the assignment was valid and vested the property in the plaintiff, and that the attachment made by the defendant, in behalf of a creditor of the firm, cannot prevail.

**MATTHEWS THACHER *et al.* versus THE DARTMOUTH
BRIDGE COMPANY.**

A corporation is not authorized to appropriate private property to public uses, without the consent of the owner, unless it appear, either by the express words of the act of incorporation, or by necessary implication therefrom, that the legislature intended to confer such authority upon the corporation.

An act incorporating certain persons for the construction of a bridge, and conferring upon them authority to take the land necessary for such purpose, without the consent of the owner, and making no provision for his indemnification, is, in this respect, in contravention of the constitution of the Commonwealth, and is so far void.

THIS was trespass for breaking the plaintiffs' close in Dartmouth, digging up the soil, and erecting a toll house thereon, &c.

The defendants, in their plea, justified the breaking, &c. under *St.* 1827, c. 54, whereby they were constituted a corporation, and were authorized to erect a bridge over a certain bar in Apponegausett river, from the western shore, to the most convenient point on the eastern shore, and they averred, that the close in question was situated on the eastern side of the river, at a convenient point for the termination of the bridge.

The plaintiffs demurred.

Coffin and Clifford, for the plaintiffs, cited *Perry v. Wilson*, Oct. 20th
7 Mass. R. 393 ; *Stevens v. Proprietors of Middlesex Canal*,
12 Mass. R. 466.

A. Bassett and Ezra Bassett, for the defendants.

SHAW C. J. delivered the opinion of the Court. In the Oct. 21st
present case, it is admitted by the defendants, that the act of incorporation under which they were authorized to erect their bridge, did not provide any mode of ascertaining or paying the damage, which any individual owners of land might sustain, by the appropriation of their property. We also understand, that by the act there is no express authority granted to the corporation to appropriate to themselves the use of private property, without the consent of the owners. The question then is, whether the plea filed in the case forms a good justification for an act, which, it is admitted by the pleadings, would be a violation of

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the plaintiffs' right of property and an act of trespass, without such justification.

In the first place, we think it very clear, that where the legislature, in the exercise of that high sovereign power, by which they are authorized to take private property for public uses, confer, or intend to confer, that power upon a corporation, they do it in express terms, or by necessary implication. It is not to be presumed, that such a power is intended to be granted, unless the intent to do so, can be clearly discovered in the act itself. In the present case, there is no such power in terms, and we think there is none by implication. It is not a satisfactory answer, to say, that without it the bridge could not be erected, because the consent of the owner might be obtained by gift or purchase of the land or an easement in it; and it might be expected, that the proprietors, over whose lands it would pass, and who might probably be benefited by it, would readily yield their consent. *Perry v. Wilson*, 7 Mass. R. 393. If it be said, that with such consent, the proprietors might proceed without an act of legislation, and that such an act was principally necessary to enable them to take private property, the answer is obvious, that with the consent of all the private proprietors, over whose land it would pass, an act of the legislature would still be necessary, to enable them to erect a toll bridge over navigable water; and without it such a bridge would be a nuisance and a usurpation of public rights, both as being an obstruction over navigable water, and as claiming a right to levy toll.

But supposing that the act could be so construed, as to confer a power on the corporation to take private property for public use, without providing for an equitable assessment, and for the payment of an adequate indemnity, the act would, in this respect, be in contravention of the constitution of this Commonwealth, and in this respect void; and so would not afford the justification relied on. The consequence would be, that the party damaged would be remitted to his remedy at common law; the wrongful act would stand unjustified by legislative grant. This has been so often decided in this Commonwealth, that it must be taken as a settled principle. *Chadwick v. Pro-*

prietors of Haverhill Bridge, 2 Dane's Abr. 686 ; *Stevens v. Middlesex Canal Co.* 12 Mass. R. 466.

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So that whether the act of incorporation pleaded by the defendants, and which is to be deemed a public act, and taken notice of accordingly, did or did not confer the power of taking private property, for the erection of this bridge, as it made no provision for the security and payment of an indemnity to individual proprietors, such proprietors may assert their property and possession, in the same manner as if the law had not been passed.

Plea adjudged bad, and judgment for the plaintiffs.

JOHN HALL *versus* APOLLOS BRIGGS.

Before the Revised Statutes went into operation, if there were two counts in a declaration on distinct causes of action, and the jury returned a verdict for the plaintiff on the first count, but disagreed as to the second, it was competent for the Court, before the verdict was affirmed, to permit the plaintiff to discontinue as to the second count ; and judgment might then be rendered upon the verdict on the first count.

TRESPASS *quare clausum*. The first count in the declaration was for a trespass committed in December, 1833. The second count was for divers trespasses committed in 1834.

The trial took place before the Revised Statutes went into operation, *Morton J.* presiding.

At the adjournment of the court in the evening of the day of trial, the jury retired for consultation, and having agreed upon a verdict for the plaintiff on the first count, and sealed it up, they separated, and returned therewith into court in the morning. Upon inquiry being made of them, it appeared, that they could not agree upon a verdict on the second count.

After the verdict was returned, but before it was affirmed, the plaintiff had leave to discontinue as to the second count. The verdict was then affirmed. The defendant objected to the affirmance of the verdict, and to the discontinuance moved for by the plaintiff. If the Court should be of opinion, that the proceedings of the judge were correct, and that he had power to grant leave to the plaintiff to discontinue according to his motion, a discontinuance was to be entered upon such

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terms as the Court might order, and judgment to be rendered on the verdict ; otherwise a new trial was to be ordered.

A. Bassett and Coffin, for the defendant, cited *Holbrook v Pratt*, 1 Mass. R. 96 ; *Daves v. Gooch*, 8 Mass. R. 488 ; *Green v. Gill*, 5 Mass. R. 379 ; Revised Stat. c. 121, § 16.

Warren and Battelle, for the plaintiff.

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SHAW C. J. delivered the opinion of the Court. The question, we think, arising in this case, is to be decided as the law stood before the Revised Statutes went into operation. The judge granted to the plaintiff leave to discontinue upon the second count, subject to the opinion of the whole Court ; and if it was legal and right to permit such discontinuance in that stage of the cause, it is now to be considered as if it was then definitively done. This has been argued as if it were a motion to amend the declaration, after the jury had come in with their verdict on one count, and disagreed as to the other. Though in common parlance, all the counts taken together, are called the declaration, and a discontinuance as to one, is in some respects a change of the declaration, yet it is in effect a very different proceeding. The proceeding generally understood by an amendment of the declaration, is an alteration in the count. And so of the plea ; where the general issue is pleaded to a declaration consisting of several counts, it is in legal effect a several plea to each count. Finding the issue therefore upon one count, is finding all the material facts, put in issue, by being averred in that count and traversed by the plea. A verdict on that issue is a good foundation, upon which a judgment may be rendered. This may be illustrated by the familiar practice, where the case is such as to warrant it, of permitting a party, where there is a general verdict, to take judgment on one particular count, and he, in effect, discontinues as to the residue. *Clark v. Lamb*, 8 Pick. 415. We think it was fully competent for the judge to allow the discontinuance in the stage of the cause in which it was offered ; and it left the case in such a condition, that judgment may properly be rendered on the verdict, on the remaining count.

JOHN A. PARKER *versus* JOHN MACOMBER.

Where the individual note of a partner, payable to the firm of which he was a member, remained in the possession of such firm till it was overdue, it was *held*, that another partner could not, after the dissolution of the partnership, negotiate it in the partnership name, although he was authorized to settle its concerns.

But where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm in payment of a debt, it was *held*, that such note, being payable to bearer, might be legally transferred to a third person, by another partner who was authorized to settle the concerns of the partnership.

THIS was assumpsit upon two promissory notes, against the maker. The cause was tried before *Morton J.*

The first note, which bore the date of November 3d, 1828, was for the sum of \$ 500, and was payable on demand, with interest, to the firm of John Macomber & Co. At that time, the firm consisted of the defendant, Bradford Howland, Daniel Howland junior, and Laban Thacher. About a year afterwards, Thacher assigned his interest in the partnership property to the other members of the firm. On December 5th, 1832, an agreement was entered into by the remaining partners for the dissolution of the partnership, and notice of such dissolution was published on the 7th and other days of the same month, in a newspaper printed in New Bedford, where the plaintiff resided. B. & D. Howland junior were authorized to collect the debts and settle the business of the copartnership. At the time of the dissolution of that partnership, Bradford and Daniel Howland junior were partners under the firm of B. & D. Howland junior, and this copartnership continued in existence after the dissolution of the partnership of John Macomber & Co.

In March, 1834, the note in question was with the partnership property, and had not then been indorsed or negotiated. It was afterward indorsed in the name of John Macomber & Co., and in the handwriting of Bradford Howland, to the plaintiff.

It appeared from the testimony of Daniel Howland junior, that the concerns of the firm of John Macomber & Co. were not settled or adjusted among its members.

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The second note, which bore the date of December 10th, 1832, was for the sum of \$ 613·61, and was payable to James H. Howland or order, on demand, with interest. This note after being indorsed to bearer, without recourse, by James H. Howland, was passed by him to John Macomber & Co. on the day of the date, or the next day, in part payment of a debt due from him; and it was then credited to him in their account against him.

Daniel Howland junior testified, that he never assigned or parted with his interest in either of the notes in question, and never authorized any person to negotiate or part with either of them in any manner whatever. The plaintiff objected to the admission of this witness, on the ground, that he must be presumed to have given currency to these notes, and therefore ought not to be permitted to impeach the right of the plaintiff, who was an innocent indorsee or holder, to maintain an action thereon against the promiser.

Thacher Thomas testified, that he was clerk in the store of John Macomber & Co. from October 1831, to the time of the dissolution of that partnership, in December 1832; that afterward he was employed in the same store, twelve or fifteen months, by Bradford Howland; that the notes in question were attached by wafers to the note-book of John Macomber & Co., and continued so attached for more than twelve months after that partnership was dissolved.

The defendant resisted the payment of the first mentioned note, upon the ground, that he did not indorse or negotiate it, and had never authorized any other person to do so, and that he was still the owner of one undivided third part thereof, in common with Bradford Howland and Daniel Howland junior. And he resisted the payment of the other note, upon the ground that he was the owner of one undivided third part thereof, as tenant in common with Bradford and Daniel Howland junior, as belonging to the partnership effects of John Macomber & Co., and also that no person had ever been authorized by him to assign or dispose of this note.

The plaintiff contended, that the second note, having been received by B. & D. Howland junior, after the dissolution of the copartnership of John Macomber & Co., and in the settle-

ment of the concerns of that company, became assets in their hands, which they had disposed of to the plaintiff, as they had a right to do, and that the act of either of them was the act of both, the firm of B. & D. Howland junior having been authorized to settle the business of John Macomber & Co.

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If the Court should be of opinion, that the plaintiff could maintain an action upon either or both of the notes, the defendant was to be defaulted and judgment rendered accordingly ; but if the plaintiff could not recover upon either of the notes, he was to be nonsuited.

Coffin and Clifford, for the plaintiff.

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A. Bassett and Ezra Bassett, for the defendant. We contend : 1. that the first note was discredited at the time when it was negotiated to the plaintiff, and, therefore, that the defendant might avail himself of the same equitable defences to which the note would be liable as between the original parties ; *Ayer v. Hutchins*, 4 Mass. R. 370 ; *Lansing v. Gaine*, 2 Johns. R. 300 ; 2. that the payees of such note could not have maintained an action against the defendant at any time, because he would have been both plaintiff and defendant in such action ; 3. that the defendant was the owner of one third of such note, and had never parted with his interest therein, and that, therefore, the payees could not have recovered of him at common law ; 4. that the note was not legally transferred, a partner not being authorized to negotiate notes in the name of the firm after its dissolution, although intrusted with the settlement of its concerns ; *Abel v. Sutton*, 3 Esp. R. 108 ; *Ramsbottom v. Lewis*, 1 Campb. 279 ; *Rosekrans v. Van Antwerp*, 4 Johns. R. 228 ; and 5. that when the second note was transferred to John Macomber & Co., it lost its negotiability, being in effect paid.

SHAW C. J. delivered the opinion of the Court. The plaintiff sues as indorsee of two promissory notes, charging the defendant as promiser. As the circumstances of the two notes are entirely distinct, it will be necessary to consider them separately.

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The first note was made by the defendant as promiser, payable to a firm, of which he was one of the partners, and remained unpaid, and neither negotiated nor indorsed, till after

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the dissolution of the partnership to whom it was payable. It was also negotiated and must have come to the plaintiff long after it had become due, and as a dishonored note ; and he was put upon his guard, by this fact apparent on the face of the note. It is, therefore, subject to all the equitable defences to which it would be liable as between original parties. It then appears, that a general dissolution of this partnership took place, and notice thereof was given in December, 1832, about four years after the note in question had been due ; and two of the former partners were authorized in general terms, to collect the debts and settle the business of the firm. The note in question, unindorsed, was left in their custody with the other effects of the late firm. It was afterwards indorsed by one of the partners who were thus authorized to settle, in the name of the late firm, and under that indorsement came into the hands of the plaintiff. We consider it wholly immaterial, whether this was done with or without the consent of the other partner, and, therefore, the testimony of Daniel Howland junior, which was objected to, was immaterial.

Under these circumstances, we are all of opinion, that Bradford Howland had no authority, by the indorsement of the name of the late firm on the note, to transfer and effectually pass a legal title in the note, and that the plaintiff derived no title under such indorsement, taking it, as he does, as a dishonored note. The indorsement was a new contract, made by one in the name of the firm after a dissolution. No such authority belonged to one or two partners after a dissolution of the partnership, by the general rules of the mercantile law, arising out of their relation as partners ; and we think it equally clear, that no such authority was conferred by the agreement of dissolution and notice, authorizing them to collect the debts and settle and close the concern. It was stated in argument, that as the defendant knew, that this note was outstanding against himself, when the dissolution took place, and the authority was given to the two other partners to collect the debts, and pay the demands against the firm, he must be presumed to have intended to give them an authority to negotiate this note. But we cannot perceive the correctness of this inference. Were it sound, as each partner must be presumed to know of

all the negotiable bills and drafts due to the firm, and unindorsed at the time of the dissolution, he must be presumed to have intended to give an authority to negotiate them in the name of the firm. But if this were so, the general rule of law would be, that an authority to settle the business, would be of course an authority to indorse negotiable securities; but the general rule is clearly otherwise.

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Some reasons, which would not be applicable to the note of a third person, apply with great force to restrain the negotiation of a note held by the firm against one of the partners, especially a note long overdue.

In the hands of the firm it was merely a voucher for an item in account, between the firm and one of its members, and it cannot be presumed, without very explicit words, that it was intended to give an authority to any of the partners after dissolution, to negotiate such a note, and thus render the promiser liable to the action of a third person. If it be said, that the proceeds may be needed to pay the debts of the firm, the answer, we think, is plain. The promiser on this note was liable with the other partners, for all the debts of the firm, independently of this note; and as between the partners themselves, if upon a settlement of the partnership account, on which Macomber, the maker of this note, should be debited for the amount of it, there should be a balance against him, their remedy would be by a bill in equity. Under the circumstances, the Court are of opinion, that the plaintiff has no cause of action on this note and indorsement.

I beg to be understood as not intending to express an opinion, that where a note is given by one member of a firm, payable to his firm, that they may not indorse it and negotiate and put it in circulation, and that a party taking it in due course of business cannot maintain an action on it, on the supposed objection, that in its origin, it was payable to a firm, of which he was a member, and which firm could have maintained no action against him, on the note. The reason why no action could be maintained in that case, is a mere technical one, namely, that a man cannot be plaintiff and defendant in the same action; but where the technical impediment is removed by an actual indorsement and negotiation, made whilst the authority so to in-

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dorse in the name of the firm continues, the holder may claim a valid title through such indorsement of the firm.

The other note stands on a different footing. It was a note made by the defendant, after the dissolution of the partnership, payable to James H. Howland or his order. It was indorsed by Howland, so as to be payable to bearer without recourse to him, and was passed to the two Howlands in part satisfaction of the debt of Howland, due to the late firm of Macomber & Co. ; and he had credit for it, as such payment. It is contended, that by this indorsement, delivery and payment, the property in the note vested in all the members of the late firm, and though it was under a blank indorsement, it could not be passed by delivery, so as to vest a valid title in the holder, without the act of all the partners. But we are of opinion, that this defence cannot be maintained. Being under a blank indorsement and passing by delivery, the title vested in any person or persons legally becoming the holders for value. Now we think the authority given to the two partners, the Howlands, to collect the debts and settle the affairs of the late firm, gave them authority to receive negotiable notes and drafts, as a means of obtaining payments. If so, they must be deemed to have received this note, as agents to settle ; they received it in their own right and the property vested in them. This being the case, as they would take merchandise, bank-stock, or other articles, affording the means of raising money, and getting in the debts, they had a right to dispose of the property, for the same purpose ; and it being a mercantile agency, each had the requisite authority. As they took the note under a blank indorsement, and it was in a condition to pass by a mere delivery, no indorsement of the firm was necessary ; and the want of authority, arising from a want of legal power to make such indorsement, applicable to the case of the other note, does not apply to this.

If it be said, that they, being agents, took this note for the use and benefit of all the members of the late firm, and so the title vested in them, we think it is necessary to distinguish between the legal and the beneficial interest. Undoubtedly the beneficial interest was in the members of the late firm, and the agents were bound to render an account of the property and apply the proceeds to their benefit. But this is quite con-

sistent with their taking a legal interest themselves, in the security, in the same manner as if they had taken goods, bank notes, or other property, to be turned into money and accounted for, pursuant to the trust and authority reposed in them for that purpose.

We are, therefore, of opinion, that the property in this note did not vest in the members of the late firm, of which the promiser was one; that he did not become a joint proprietor, or tenant in common, or acquire any property in the note specifically; that the Howlands, or either of them, taking it as they did, had a sufficient authority to negotiate and transfer it by delivery, and that though the plaintiff acquired it when overdue, as there is no defence to it, he has a good and legal right to recover the amount of it in this action.

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MOSES GUILD *et al.* versus HORATIO LEONARD.

A. and B. being the only copartners in one company, and being likewise partners with other persons in two other companies, A. made a deed poll to B., of all the grantor's interest in certain real estate and in the personal property of the three companies, the deed being nominally for a pecuniary consideration and containing a covenant that the grantee would indemnify the grantor against all the debts due from the three companies. The deed was accepted by the grantee, but was not executed by him. It was *held*, that as the grantee would be liable in assumpsit, as upon an implied promise to pay the creditors and indemnify the grantor, this was a valid consideration for the deed, as against partnership creditors of A. and B. So B. having afterwards, by deed poll, conveyed all his interest in the same real estate and in the property of one of the three companies, "in consideration of one dollar paid by the grantees, and they becoming obligated to pay the debts of the same company," and the deed having been accepted by the grantees, though not executed by them, and they having paid those debts, it was *held*, that the deed was founded on a valid consideration as against partnership creditors of A. & B.

THIS was an action on the case, against the sheriff of the county of Bristol, for a default of one of his deputies. The plaintiffs were Moses Guild, Samuel Guild, Milton Barrow and Milton Barrows junior.

At the trial, before *Morton J.*, it appeared that, previously to June 1829, Palemon Walcott and Bennett Whipple were copartners under the name of Walcott & Whipple, and also members of the firm of Bennett Whipple & Co., and of the

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Lanesville Manufacturing Company, a voluntary association consisting, besides themselves, of Milton Barrows, one of the plaintiffs, and Henry Marchant; that prior to the 15th of June, 1829, Walcott & Whipple had conveyed their interest in certain real estate, cotton mills, &c. to Elisha Waterman, in mortgage, which mortgage was still in full force; that at the time when this mortgage was made, Walcott was the owner of five fifteenths of the property, and Whipple of four fifteenths; and that they were also interested in the same proportion, in the Lanesville Manufacturing Company.

On the 15th of June, 1829, Walcott, by a deed poll, conveyed all his estate and interest in the mortgaged estate, including the debts and personal property of every description belonging to Walcott & Whipple, Bennet Whipple & Co. and the Lanesville Manufacturing Company, to Whipple, the consideration named being the sum of \$500. After describing the property, the deed proceeded as follows: "And I, the said Bennett Whipple, my heirs and assigns, do covenant and agree with the said Palemon Walcott, his heirs and assigns, to bear the said Palemon Walcott harmless from all the debts, dues and demands that may be due from either of the above named firms or companies, the same being a part of the consideration of the above granted and bargained premises." This deed was not executed by Whipple. On the day of its date, Walcott was in failing circumstances. Neither the sum of \$500, nor any other sum, was paid as a consideration for the conveyance. The deed was recorded on the 18th of June, 1829.

On the 16th of December, 1829, Whipple, Milton Barrows and Marchant, describing themselves as the Lanesville Manufacturing Company, conveyed all their interest in the property above mentioned, to Moses and Samuel Guild, two of the plaintiffs, and to one Beckwith, in mortgage, for the purpose of securing them against any liabilities which they had assumed or might assume, for the Lanesville Manufacturing Company, and also for any advances which they might make to it. The consideration named in this mortgage was \$30,000.

Previously to April, 1830, certain creditors of Walcott and Whipple attached all their interest in the real estate described in these several conveyances.

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On the 22d of April, 1830, Whipple, being in failing circumstances, conveyed to Moses and Samuel Guild and Milton Barrows junior, four fifteenths of all the real estate, "in consideration of one dollar paid me by" the grantees, "and they becoming obligated to pay four fifteenths of the Lanesville Manufacturing Company's debts;" but no consideration was in fact paid, and no obligation given by the grantees to pay any part of such debts, they then being members of the company.

On the 15th of January, 1831, Whipple conveyed to the same grantees, who were still members of the Lanesville Manufacturing Company, one fifteenth of the same property, the consideration expressed being the same as in the last mentioned deed. On the same day Whipple conveyed to the four plaintiffs, four fifteenths of the real estate and all his interest in the property, of every description, belonging to the Lanesville Manufacturing Company, to be held by them in the following proportions, three fifteenths by Milton Barrows, and one fifteenth by the other plaintiffs. The consideration was expressed in the same words as in the two last mentioned deeds, substituting \$ 50 for \$ 1. No written obligation was given by the plaintiffs, or any of them, to Whipple or Walcott, to pay any part of the debts of the Lanesville Manufacturing Company; nor was any evidence offered of a parol promise to that effect.

The plaintiffs produced notes and drafts of the Lanesville Manufacturing Company, which were in their hands, cancelled, and which had been given by that company before the date of the two last mentioned deeds, and upon which they were liable on the 15th of January, 1831, to the amount of between \$ 25,000 and \$ 23,000.

No evidence was given as to the amount of the debts of the Lanesville Manufacturing Company on the 15th of January, 1831, excepting that Whipple stated his impression to be, that it was \$ 25,000 or \$ 30,000. Whipple further testified, that he knew of no debts outstanding against that association, but that he had no knowledge whether the debts were paid before or after February, 1832.

Alfred Barrows and Whipple testified, that Milton Barrows was present when the deed from Walcott to Whipple was ex-

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ecuted, and that they both believed that the deed was read aloud in his presence.

On the 6th of February, 1832, the right of Walcott & Whipple to redeem the real estate which had been attached before April 1830, by two of their creditors, was sold in order to satisfy two executions issued in favor of those two creditors, and a balance of the proceeds remained in the officer's hands. On the 4th of February, 1832, certain persons, who were *bonâ fide* creditors of Walcott & Whipple at the time of the conveyances before mentioned, attached this right of redemption, and delivered their writs to the officer holding such executions, who was the deputy sheriff, for whose doings this action was brought against the defendant. This deputy returned on those writs an attachment of the equity of redemption above mentioned; and the actions were duly entered and continued for judgment.

On the 23d of March, 1832, the plaintiffs demanded of the deputy sheriff the balance of the proceeds remaining in his hands after deducting the amount of the executions before mentioned and fees, he having been notified, before the last attachments, of the claims of the plaintiffs.

No evidence was given of the value of the personal estate mentioned in any of the conveyances.

The defendant contended, that upon these facts, this action could not be maintained.

A verdict was entered by consent for the plaintiffs, subject to the opinion of the Court.

The case was argued in writing.

Coffin and *Cushman*, for the plaintiffs, cited to the point, that it was not necessary that the deed from Walcott to Whipple should have been executed by Whipple, he having bound himself, by his acceptance of the deed, to indemnify the grantor against his liability to the creditors of the several firms mentioned therein, *Goodwin v. Gilbert*, 9 Mass. R. 510; to the point, that the object of Whipple in making the conveyances to the plaintiffs, was merely to pay a class of creditors to the whole extent of their claims, and, therefore, that such conveyances were not fraudulent, *Estwick v. Caillaud*, 5 T. R. 420; *Harrison v. Trustees of Phillips Academy*, 12 Mass. R.

462 ; *Bridge v. Eggleston*, 14 Mass. 247 ; that there was a sufficient consideration for these deeds, *Eaton v. Campbell*, 7 Pick. 10 ; *Harrison v. Trustees of Phillips Academy*, 12 Mass. R. 462 ; and that it was not enough to prove that Whipple intended, by these conveyances, to delay or defeat his creditors by preventing their attachment, but it must be shown that both parties participated in the fraud, *Foster v. Hall*, 12 Pick. 98.

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Warren and Darling, for the defendant, cited to the point, that if the payment of the creditors of Walcott & Whipple was to be considered a condition precedent, to which payment both Whipple and the plaintiffs, as his assigns, were bound, then the debts of Walcott & Whipple must be paid before the title could vest in the plaintiffs, 1 Bac. Abr. *Condition*, 652 ; 2 Bl. Comm. 154 ; Co. Litt. 217 ; and that as the several deeds by which this property had been conveyed were substantially conveyances in trust for the payment of debts, and no creditor had become a party thereto, and no consideration had been paid, they were voluntary and void, 2 Powell on Mortg. 656, 657, 658, note, 659 ; *Brewer v. Pitkin*, 11 Pick. 298 ; *Ward v. Lamson*, 6 Pick. 358 ; *Russell v. Woodward*, 10 Pick. 408 ; *Widgery v. Haskell*, 5 Mass. R. 144 ; *Stevens v. Bell*, 6 Mass. R. 344 ; 3 Bac. Abr. 312.

PUTNAM J. delivered the opinion of the Court. The plaintiffs claim a sum of money in the defendant's hands, being a balance arising from the sale of a right in equity to redeem certain real estate, sold as belonging to Walcott and Whipple, to satisfy two executions in favor of their creditors. The sale was made by a deputy of the defendant. The plaintiffs' right is attempted to be maintained, under the deeds of Walcott and Whipple.

The first question to be considered is, whether the deed from Walcott to Whipple, made on the 15th of June, 1829, is, upon the facts stated in the report, to be adjudged fraudulent against creditors. It is a deed poll. It purports to have been made for the consideration of \$ 500, and contains an agreement on the part of the grantee, to save the grantor harmless from the debts due from the parties (who were partners,) from Bennett Whipple & Co., of Cumberland, and from the

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Lanesville Manufacturing Company. The case finds that the \$ 500 were not paid, and that the grantee did not execute the deed. And the deed has no *habendum*.

The objection is, that a valid consideration has not been proved. But the grantee accepted the deed upon the terms therein set forth; and he would be liable in an action of assumpsit to pay the creditors of the grantor and indemnify him against his liabilities, according to those terms. The law would imply such a promise and undertaking by the grantee, notwithstanding he did not execute the deed. Such a promise would be legally implied from his acceptance of the deed which contained the undertaking or stipulation of the grantee. He must take the estate accordingly. *Goodwin v. Gilbert*, 9 Mass R. 510. And there are facts stated in the case, from which a jury might infer that the grantee went on and paid the debts according to the intent of the parties. The estate conveyed being subject to a mortgage, the grantee took a right in equity to redeem the same.

The right which Whipple acquired, was conveyed to the plaintiffs in virtue of the deeds of the 23d of April, 1830, and of the 15th of January, 1831; but subject to the attachments made by the creditors of Walcott and Whipple before April, 1830; pursuant to which the two executions, issued upon judgments recovered by those creditors, have been properly levied and satisfied by the sale of the equity. But those deeds were good against the attachments which were subsequently made. And they are to be maintained upon the same grounds as are stated before as sufficient to support the deed from Walcott to Whipple. Nothing appears in the facts reported, from which these deeds are to be adjudged fraudulent as to creditors. They were not made to delay or defeat creditors, but to prefer some creditors over others; which was a lawful and not a fraudulent intent. And the debts due to such preferred creditors were all paid before February, 1832, when the attachment was made by the creditors of Walcott and Whipple, for whom the defendant makes this defence.

We are all of opinion, that the plaintiffs are entitled to recover of the defendant the proceeds of the sale of the right in equity, &c. remaining in his hands, after deducting the amount

of the two executions and fees described in the plaintiffs' declaration, with interest from the 23d of March, 1832, when the plaintiffs made their demand.

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JOHN GILMORE *et al.* versus GEORGE R. WILBUR *et al.*

In an action for wood sold, the plaintiff having proved that the defendant had contracted to cut wood on the plaintiff's land, and that the defendant had admitted that he had cut wood, and that he owed the plaintiff therefor, the defendant alleged that the wood cut by him grew on the adjoining land of a third person. It was *held*, that the burden of proof was on the plaintiff to show that the wood was cut on his land, and not on the defendant to show that it was cut on the adjoining land.

ASSUMPSIT for wood alleged to have been cut on the plaintiffs' land.

At the trial of this case, before *Morton J.*, the plaintiffs produced in evidence certain deeds by which a parcel of land, called lot No. 12, in Plymouth woods, was conveyed to them.

Melvin Gilmore, who was called as a witness by the plaintiffs, testified, that about the year 1825, which was subsequent to such conveyances, the plaintiffs being absent from the State, George R. Wilbur, one of the defendants, applied to him, as agent of the plaintiffs, for the purchase of wood to be cut and converted into coals; and that the witness assented to his cutting it. The plaintiffs also proved the confessions of the defendants, that they had cut wood, which had been converted into coal, and had carried it to a furnace, and that they owed the plaintiffs for it.

The defendants admitted a contract with the plaintiffs, and that they had cut wood in Plymouth woods, but not on the plaintiffs' land; and the question at the trial was, whether the defendants cut the wood on lot No. 12, or on lot No. 11, which belonged to the father of the defendants. The plaintiffs contended, that upon this question, the burden of proof was on the defendants; but the judge ruled that it was on the plaintiffs.

The jury returned a verdict for the defendants; and the plaintiffs excepted to the ruling of the court.

Adby and *A. Bassett*, for the plaintiffs, cited *Vibbard v.* Oct. 28th.

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Johanson, 19 Johns. R. 77 ; *Lane v. Crombie*, 12 Pick. 177 ;
1 Stark. on Evid. 376.

Warren, Coffin and Lothrop, for the defendants, cited *Atileborough v. Middleborough*, 10 Pick. 378 ; *Smith v. Taylor*, 4 Bos. & Pull. 210.

PUTNAM J. afterward drew up the opinion of the Court. The plaintiffs undertook to prove two things : 1. That the defendants cut and coaled the wood ; and 2. That it was upon the plaintiffs' land.

They began by offering in evidence the deeds of lot No. 12, which they claim ; and they proved by the confessions of the defendants, that the defendants cut wood and made it into coal, carried it to market for their own account, and owed the plaintiffs for it. Thus they made out a good *prima facie* case. On the other hand, the defendants introduced evidence to rebut the testimony which was offered by the plaintiffs, tending to show, that the defendants were mistaken in respect to the acknowledgments which they had made, and that they cut the wood on lot No. 11, which adjoined the plaintiffs' land, and which belonged to another person. And upon the whole evidence the jury were satisfied, that the plaintiffs had not sustained the burden of proof which the judge determined to rest upon them ; and the verdict was given for the defendants.

The plaintiffs contend, that under the circumstances, the court should have instructed the jury, that the plaintiffs were entitled to recover unless the defendants proved that they cut the wood on lot No. 11 ; and if so, the verdict should be set aside, and a new trial should be granted.

But we think there is a fallacy in the plaintiffs' argument. It consists in this They take it for granted that they had proved a conclusive case. As, for example, if the action had been upon a note or bond, and the defendants had pleaded payment or release, thereby admitting the execution of the note or bond ; in which case the burden of proof undoubtedly would rest upon the defendants to prove the payment or the release. Or, as in trespass for an assault and battery and imprisonment, and a plea in justification, that the defendant arrested the plaintiff in virtue of a writ or warrant against him ; there the defendant admits conclusively, that he made the assault, &c. and must prove that he had a legal writ or warrant.

Another case will illustrate this matter. Suppose one should sue another on a promissory note. He would be bound to prove the signature. Suppose the defence to be made on the ground that the signature was a forgery, and the plaintiff should offer evidence tending to show that it was genuine, and, among the proofs, should show that, on some occasion, the defendant himself had acknowledged the signature; yet the defendant would be permitted to rebut the evidence so introduced by the plaintiff. The defendant might explain the circumstances under which he made the acknowledgment of the genuineness of the signature, and show that he was mistaken. And, after all this, the burden of proof would not change; it would continue upon the plaintiff; and if he could not satisfy the jury that the signature was genuine, he could not and ought not, by law, to recover.

The case of *Vibbard v. Johnson*, 19 Johns. R. 77, has been strongly relied upon, in support of the argument for the plaintiffs. In that case, the defendant purchased a chest of tea, and received it from the plaintiff, knowing that it was claimed by another to be his property; and it was said, that the purchaser, who had voluntarily paid the other claimant for the tea, could not be permitted to set up such a voluntary payment in his defence against the plaintiff, who sold and delivered the property. It was properly held, that the defendant should have waited until the other claimant has established his better right by legal process.

But a most material fact was proved in that case, which is the very subject of controversy in the case at bar, viz. the possession of the thing. If the wood was cut from No. 11, it was not in the possession of the plaintiffs. The plaintiffs' lot lay somewhere in Plymouth woods. They did not go upon the ground and show where the trees were to be cut. If they had, then, according to the case of *Vibbard v. Johnson*, they could not set up the title of a third person in defence, until they had been subjected to the payment of damages to such third person. In the case cited the defendant was guilty of a breach of duty. He knew of the adverse claim; he contracted with and received the goods from the plaintiff, who had the same in his actual possession; and yet, in violation of his en-

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gagement to pay the plaintiff, he voluntarily paid the adverse claimant.

There are cases where, from the relation existing between the parties, a defendant cannot be permitted to set up a title in a third party, or contest the title of the plaintiff; as in the case of landlord and tenant; so in *Kennedy v. Strong*, 14 Johns. R. 128, where the defendant received the goods as the factor of the plaintiff, he was not permitted to show, that the goods were forfeited by the plaintiff to the United States. He was held properly to account to his principal, and leave the matter of ultimate right to be settled between the principal and the United States.

But no such relation exists in the case at bar. Here the defendants intended to cut the wood upon the plaintiffs' land; but the plaintiffs have no just claim against them, unless the plaintiffs can prove that they have done so. Reverse the case, and suppose that the defendants had paid the money to the plaintiffs at the time when the defendants made their acknowledgment, and that afterwards the owner of lot No. 11 had sued the defendants and compelled them to pay damages for the trespass; and suppose the then defendants to sue the new plaintiffs for money paid by mistake. In that case, the burden would be upon the now defendants to show the mistake, and to satisfy the jury, that they had not cut upon the plaintiffs' land. But in the present posture of the parties, it is just as clear, that to enable the plaintiffs to recover, they must show that the wood was cut upon their own land.

We all think that the direction of the judge who tried the cause was correct, and that the judgment should be rendered for the defendants according to the verdict.

ALLIN HUNT, Administrator, &c. *versus* JOSEPH
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The filing of a claim in set-off, by a defendant, is equivalent to the commencement of an action thereon, so far as regards the statute of limitations ; and if the plaintiff discontinue his action, the defendant may prevent his claim from being barred by the statute, by commencing an action thereon within three months thereafterwards, although the time of limitation have expired.

On a case stated it appeared, that this was assumpsit on five promissory notes, given by the defendant to the plaintiff's intestate, and dated November 30th, 1822, May 26th, 1828, February 16th, 1829, May 13th, 1829, and September 5th, 1829, respectively. The notes were payable on demand and were not witnessed. The writ was dated the 12th of May, 1835, and served on the 15th.

The defendant relied upon the statute of limitations as a bar to all the notes which were of more than six years standing at the time of the commencement of the action.

The plaintiff, in order to avoid the statute of limitations, relied upon the following facts :

On May 21st, 1833, Spaulding commenced an action against Hunt, the present plaintiff, to recover a claim against the intestate ; and on the 27th of the same month Hunt filed the notes in set-off against the claims of Spaulding, in pursuance of the law in such case provided. That action was continued to the March term of the Court of Common Pleas in 1834, and was then brought, by appeal, to this Court by Spaulding, and continued from term to term until the April term 1835, when Spaulding obtained leave to discontinue his action, notwithstanding Hunt objected thereto. The discontinuance was subsequently affirmed by the whole Court. Hunt thereupon brought the present action on the notes ; and Spaulding filed in set-off in this action his claims against the intestate. Spaulding did not give any notice, that he should move for leave to discontinue his action, nor assign any reason for discontinuing it, until the case was argued before the whole Court.

The present case was referred to the whole Court, without
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argument, to determine which of the notes in question, if *any*, were barred by the statute of limitations, at the commencement of the present action.

Eddy and Cushman, for the defendant.

A. Bassett and Wilkinson, for the plaintiff.

PUTNAM J. drew up the opinion of the Court. We are all of opinion, that the filing of the notes as a set-off in the suit which Spaulding commenced against Hunt, in May, 1833, is to be considered as the bringing an action upon the notes. They were filed on May 27th, 1833.

By *St. 1793, c. 75, § 2*, it is provided, that when any action which hath been or shall be declared in as aforesaid, (that is, within the term of six years, &c.) and in which the writ purchased therefor has failed of a sufficient service or return by any unavoidable accident, or by the default, negligence or defect of any officer to whom such writ was or shall be duly directed, or when such writ shall be abated or the action there by commenced shall be avoided by demurrer or otherwise for informality of proceedings, then and in any such case the plaintiffs or plaintiff, or his or her executor or administrator, may commence another action upon the same demand and shall thereby save the limitation thereof, &c. provided, that such second action shall be commenced, &c. at the next Court of Common Pleas, &c. within three months next after the court whereto the former writ was or shall be returnable, or wherein judgment of abatement or other avoidance of such suit shall happen, and not afterwards.

The action of Spaulding against Hunt was discontinued in April, 1835; and the claim of the now plaintiff upon the notes which he had filed, was avoided, and that proceeding was effected by Spaulding against the prayer of Hunt.

The *St. 1784, c. 23*, provides, that defendants may file their accounts, and that they may recover a balance in the same manner as if they had brought their action therefor. And by the 4th section of the statute of 1793, if the statute of limitations shall be objected to the matter filed as a set-off, it should be considered and allowed in the same manner as if an action had been duly commenced thereon by declaring in the same. See Revised Stat. c. 120. § 19; and *St. 1834, c. 182, § 4*,

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provides for the same application of the law, as to debts on simple contracts, "alleged by way of set-off on the part of any defendant, either by plea, filing or otherwise :'' thus placing the filing of the set-off upon the same ground as the commencement of an action by the defendant.

By the act of the now defendant the claim of the plaintiff upon the notes was avoided ; and this action having been commenced within three months next afterwards, it puts the rights of the plaintiff upon the same ground as they stood at the time when he attempted to enforce the notes by filing them, as is before stated.

So we are all of opinion, that the only note which at the time of filing was barred by the statute, is that which bears date on the 30th of November, 1822 ; all the others are saved from the operation of the statute by filing the same and afterwards commencing this action to recover the same.

ADOLPHUS K. BORDEN *et ux.* *versus* THE HINGHAM MUTUAL FIRE INSURANCE COMPANY.

Where property was insured by a mutual insurance company to an amount founded on a representation made to them in regard to its value by the assured, and with the knowledge, or the means of knowledge, of the situation and actual value of the property, and the assured paid a premium and assumed liabilities as a member of the company, proportioned to the amount insured, it was *held*, that in the absence of fraud, the company was liable for the whole of such amount, although it exceeded the value of the interest of the assured.

ASSUMPSIT on a policy of insurance.

On a case stated it appeared, that the defendants, by their act of incorporation, were authorized to insure dwellinghouses or other buildings to an amount not exceeding three quarters of the value of the property insured. The act further provides, that "in case any member shall have a just claim against the corporation, exceeding the amount of their then existing funds, the directors shall, without delay, assess such sums as may be necessary, on the members, which assessment shall be in proportion to the amount of his premium or deposit, but shall not, in any case, exceed double the amount of said premium and deposit."

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On September 1st, 1834, the defendants executed a policy insuring for the plaintiffs the sum of \$ 1250, on their dwellinghouse in North Bridgewater, and the sum of \$ 250, on a barn and shed adjoining thereto, during the term of seven years. The policy stated that the sums so insured were not more than three fourths of the value of the property. The plaintiffs paid the sum of \$ 17.25, as a premium, and gave their note to the defendants for the sum of \$ 69, as deposit money.

In the representation made to the defendants by the plaintiffs, in writing, at the time of the execution of the policy, the house was valued at the sum of \$ 1700, and the barn and shed, at the sum of \$ 350. It was also set forth in such representation, that the buildings were mortgaged by Daniel Huntington to the first parish in North Bridgewater, in January, 1831, to secure the payment of the sum of \$ 1650.

On August 1st, 1834, Huntington quitclaimed all his right and title in and to the premises, to the female plaintiff. On May 26th, 1834, the mortgagees, by their treasurer, entered on the premises for the purpose of foreclosing the mortgage. On March 6th, 1836, the buildings insured were destroyed by fire. The buildings were worth the sum of \$ 2000, before their destruction, and the land upon which they stood was of the value of \$ 1000. The materials, &c. not consumed and remaining on the land, were worth the sum of \$ 200. At the time of the destruction of the buildings, the principal of the note given by Huntington to the parish, and secured by the mortgage, was unpaid; and a portion of the interest thereon was due from January 21st, 1835. No agreement was ever made on the part of the plaintiffs, to pay the amount due on the note and mortgage.

Benjamin Kingman was the agent of the defendants in North Bridgewater, and the policy in question was effected through his agency. He was also treasurer of the parish, and the mortgage and note were both made payable to him as such treasurer, and remained in his care.

The Court were to determine the amount, if any, to be paid by the defendants to the plaintiffs, and to enter a nonsuit or default, as the case might require.

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Beal, for the plaintiffs, cited *Strong v. Manufacturers Ins.*

Co. 10 Pick. 44; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Miner v. Tagert*, 3 Binney, 205.

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Eddy and *Lincoln*, for the defendants, cited 3 Kent's Comm. (3d ed.) 371; *Marshall* on Insurance, 529, 549, 554, 684, 685; *Eager v. Atlas Ins. Co.* 14 Pick. 141; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Parks v. General Int. Ins. Co.* 5 Pick. 34; *Haven v. Gray*, 12 Mass. R. 71; *Forbes v. Aspinall*, 13 East, 323; *Mellen v. National Ins. Co.* 1 Hall, (New York,) 452; *Steinback v. Rheinlander*, 3 Johns. Cas. 269; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Laurent v. Chatham F. Ins. Co.* 1 Hall, (New York,) 41.

PUTNAM J. afterward drew up the opinion of the Court. The defence is made on the ground, that the plaintiffs had not an insurable interest to the amount of \$ 1500 insured by the policy. The dwellinghouse was valued at \$ 1700; the barn and shed, at \$ 350; and the land on which they stood was worth \$ 1000; amounting in all, to \$ 3050. There was a mortgage for \$ 1650. The value destroyed by the fire was \$ 1850. The plaintiffs represented to the defendants, that the estate was mortgaged, as is above stated. And the plaintiffs purchased the right to redeem, by a deed of quitclaim from the mortgager. They took the estate subject to the mortgage; and the mortgagees have entered for condition broken. If the plaintiffs do not redeem, they will lose the land; for they have no recourse against the mortgager. He has made no covenant to pay the mortgage; but he has merely quitclaimed to the plaintiffs his right and title to the estate. Now if the amount of the plaintiffs' interest should be limited by deducting the amount due on the mortgage from the estimated value of the estate, it would be reduced to about \$ 1300; and the value of their insurable interest, being not more than three fourths of the value of the property, according to that hypothesis, would have been less than one thousand dollars. Yet with full knowledge of the mortgage, and with full knowledge, or the means of knowledge, of the actual value of the buildings, the defendants undertake to insure to the amount of \$ 1500, being less than three fourths of the value of the buildings, as estimated in the policy.

This is, indeed, a contract of indemnity; but we are to con-

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strue it according to the true intent and meaning of the parties ; and we are not at liberty to make a new contract for them. The representation of the plaintiffs was made when the contract was made. It became then of vital consequence to settle the value, because the premium, the deposit, and the liability of the plaintiffs to assessments, were then to be fixed for seven years to come. We do not know what strangers would have considered the buildings to be then worth. They might have been worth more or less, than the plaintiffs estimated them to be worth. But we do know that the plaintiffs estimated their interest in them to be worth \$ 2,050, notwithstanding the mortgage ; and the defendants agreed to it. If it were not so, the plaintiffs would not get the security by the policy for which they paid, against the risk of fire ; and the defendants would get an amount of premium and deposit, and a right or claim for contribution against the plaintiffs, who became members of the company, greatly beyond what they were entitled to have.

If a great calamity by the destruction of property insured against fire had happened, and assessments had been made upon the members, we think the plaintiffs could not have been allowed to claim a deduction from their contribution, premium and deposit, on the ground of an over-valuation. The answer would have been ready and effectual. The defendants would have said, " we took your own estimate of the value ;" and the plaintiffs would have been concluded by it. And now, when the defendants come for an allowance, and claim to make the same objection, we think the plaintiffs may well answer, " you have accepted our estimate, and are bound by it as well as we are." We think that the parties did not intend, that the value of the buildings insured should thereafterwards be drawn into question. The plaintiffs made, and the defendants accepted the estimate ; and the contract was made upon that basis. No fraud, concealment or gaming, is suggested.

We are all of opinion, that the plaintiffs are entitled to recover the whole amount insured, it being less than the amount destroyed by the fire.

Defendants defaulted.

LEVI COOK *et al.* versus DANIEL BISBEE
Junior *et al.*

The owner of a parcel of land sold a furnace and other buildings situated thereon, and subsequently leased to the purchaser, his heirs and assigns, the land and water privilege on which the furnace stood, the purchaser covenanting to pay "the sum of \$10 a year, so long as he should keep the furnace and buildings on the land, in full for the rent of the premises"; but the furnace was suffered by the purchaser to go down, he, however, continuing to pay or tender the rent, and one of the buildings was appropriated to another use. It was *held*, that this was a lease for so long a time as the purchaser, his heirs and assigns, should keep the furnace and buildings on the land; and that it could not be terminated by the lessor, under these circumstances, until a reasonable time should have been allowed to the purchaser to rebuild the furnace, it not appearing, affirmatively, that he had abandoned it.

THIS action was brought to recover a parcel of land, with the water privilege and appurtenances thereto belonging, situated in Kingston. By the report of a referee it appeared, that on the 19th of April, 1803, John Faunce, the ancestor of the demandants and the original owner of the premises, for the consideration of \$150, sold and conveyed to George Russell, his heirs, executors, administrators and assigns, the whole of the buildings thereon, which were known by the name of the Kingston furnace, together with the coal-house, pot-house and all the implements and utensils belonging thereto; that by an indenture between Faunce and Russell, executed on the 13th of July, 1803, Faunce leased to Russell, "his heirs and assigns, the privilege on which Kingston furnace (so called) now stands, with a right to use all the water from the first day of September to the first of the ensuing April, annually; also, the land on which the buildings now stand; also, so much land as shall be necessary to lay on stock for said furnace, meaning hereby all the privileges which have heretofore belonged to said furnace, including the use of roads to pass and repass to and from said furnace, with liberty of taking from said land, sand, cinders, or gravel, for the repair of the dam when necessary"; and that Russell covenanted, in such indenture, for himself, his heirs and assigns, to pay to Faunce, his heirs and assigns, "the sum of ten dollars a year, (so long as he shall

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keep the said furnace and buildings on said land,) in full for the rent of the premises."

It further appeared, that Russell entered into the possession of the furnace and privilege; that in 1817, a pot-house, built in part from the materials of the old pot-house, was put upon the premises by those then in possession of the furnace; that the furnace had not been put in blast since 1819; that in 1824 the great wheel and utensils were removed, and nothing remained of the furnace except the stack; and that no use had been made of the pot-house since the furnace had gone down, until it was converted into an auger shop by the tenants; who succeeded, in 1833, to all the rights and privileges conveyed or leased by Faunce to Russell.

There was no evidence of any act, on the part of the tenants, indicating an intention to rebuild or revive the furnace; but the rent was paid, agreeably to the covenant in the indenture, up to the 13th of July, 1833, the last payment being made by the tenants; and it was admitted, that they had since offered to pay the rent as it became due.

On the 11th of December, 1833, notice to quit was given, on behalf of the demandants, to the tenants, who, notwithstanding, continued their possession by occupying the pot-house.

The referee reported, that the demandants were not entitled to recover, and his report was accepted by the Court of Common Pleas. The demandants filed exceptions.

Oct. 26th.

Warren and W. Thomas, for the demandants, cited *Salisbury v. Hale*, 12 Pick. 422; *Doe v. Dodd*, 2 Nev. & Manning, 838; *Chambers on Leases*, 90; *Strong v. Benedict*, 5 Connect. R. 210; *Folts v. Huntley*, 7 Wendell, 210.

Eddy and Beal, for the tenants, cited *Doe v. Dixon*, 9 East, 15; *Biglow v. Battle*, 15 Mass. R. 313; *Littrel's case*, 4 Co. R. 86; *Saunders v. Newman*, 1 Barn. & Ald. 262; *Shep. Touch.* 100; *Hurd v. Cushing*, 7 Pick. 169.

PUTNAM J. afterward drew up the opinion of the Court. The question is, whether the lease made by Faunce to Russell was terminated. It is drawn inartificially; but it must be construed most in favor of the lessee, where the words are doubtful. *Doe v. Dixon*, 9 East, 15.

The plaintiffs are the legal representatives of the lessor, and

entitled to recover if the lease has terminated. The defendants lawfully claim under the lessee, and are to hold the premises if the lessee could now hold the same against the lessor.

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It appears that the lessee had bought the buildings known by the name of the Kingston furnace, of the lessor. It became necessary for the lessee to have the use of the privilege, on which they stood. That is expressly granted by the lease. He was to have all the water, from the 1st of September to the 1st of April, annually. He acquired also the use of the land whereon the furnace and buildings stood, and rights of way, &c. ; and he was to pay \$10 a year for the privilege. So far there is no difficulty. But for what time were the premises leased or granted? The answer, in the words of the lease, is "so long as the lessee, his heirs and assigns shall keep the furnace and buildings on the premises."

If the furnace and buildings had been destroyed, it would seem to be very clear, that the lessee, or his heirs and assigns, might rebuild, and that he or they could not be considered as terminating the lease because they did not always and continually in fact keep up the furnace and buildings. Such a construction would never have been contended for, probably, on the part of the lessor.

Now the furnace has gone down, but the assignees of the lessee keep the other buildings on the land, and the rent has been paid and accepted up to the year 1833. At that time it would seem to be very clear, that both parties to the lease, or their assigns, considered it to be in full force. We think it does not appear, affirmatively, that the defendants have abandoned the furnace.

The defendants have offered to pay the rent since that time; but it has been refused by the plaintiffs. Now the inference from that circumstance is rather, not only that the defendants have not abandoned, but that they do not intend to abandon the contract. And so long as the plaintiffs may have their rent, it seems to us that the defendants may have and take their own reasonable time to rebuild the furnace; which time had not terminated, as we think, when the action was brought.

GEORGE P. RICHARDSON *et al. versus* ELISHA
WHITING *et al.* and Trustees.

The shipper of goods on board a coasting vessel, is not liable, under the trustee process, to a creditor of the master, for the amount of the freight, it appearing, that the master had no claim against the owners of the vessel, for his services, or otherwise.

By the answer of John Bartlett, one of the trustees, it appeared, that he had shipped goods at various times before the date of the writ, on board a vessel engaged in the coasting business between Boston and Plymouth, and owned by divers persons in Plymouth, of which the defendant, Whiting, was master, but not otherwise interested therein; that the respondent was indebted, on account of the freight of such goods, in a sum not exceeding \$25; that the owners claimed of the respondent whatever might be due on account of such freight, he being given to understand that they were not indebted to the defendants, or either of them, on account of the services of Whiting, when the writ was served, but that Whiting was indebted to them to the amount of all outstanding dues for freight; that the master never signed any bill of lading in any transaction with the respondent, according to his recollection; and that he had made a settlement with the master once a year, and paid over the freight to him.

Oct. 26th. *W. Thomas*, for the trustees, cited *Smith v. Plummer*, 1 Barn. & Ald. 576; *Fisher v. Willing*, 8 Serg. & R. 118; *Ship Grand Turk*, 1 Paine, 73; *Ship Packet*, 3 Mason, 255; *Van Bokkelin v. Ingersoll*, 5 Wendell, 315; 3 Kent's Comm. 131; *Loring v. Penniman*, 4 Mass. R. 91.

Beal, for the plaintiffs, cited *Lewis v. Hancock*, 11 Mass. R. 72; *Milward v. Hallett*, 2 Caines's R. 77; *Hodgson v. Butts*, 3 Cranch, 140; *Lyle v. Barker*, 5 Binney, 457.

PUTNAM J. afterward drew up the opinion of the Court. We understand from the answer of the party summoned as trustee, that the master has no claim against the owners for his services, or otherwise, and that the owners themselves have demanded and claim to receive the money due from the freighters.

The plaintiffs rest their cause on the case of *Lewis v. Hancock*, 11 Mass. R. 72. In that case the consignees had paid the freight to the agent of the owners, taking their contract of indemnity to repay, if it should appear that they could not legally receive it. The plaintiff's counsel contended, that the master had a lien upon the freight, for his own and mariners' wages, and for repairs. The Court held, that the owners should repay the money. But the case does not state the amount of the master's claim, nor in what it consisted. The opinion proceeds, we think, upon the assumption, that the payment to the owners was in violation of some rights or lien of the master in or upon the money. C. J. *Sewall* said: "He (the master) may be understood, as against the owner himself, to have the same right in the freight money, which a factor or consignee has in the goods of the principal or consignor, for whom money has been advanced, or any liabilities incurred in consequence of the employment or consignment." Be it so, for the sake of the argument. But suppose the factor has been paid for all his services and advancements, what right has he, more than a stranger, to withhold the property of the principal? The case cited surely does not decide that he would have any. If one should purchase goods of a factor, and the principal should demand the money himself, and give notice to the purchaser not to pay to the factor, at the same time informing him that the factor had no lien upon the property, the buyer would not be justified in paying the factor, unless he could prove that the factor had a lawful lien upon the property to the extent of the sum so paid. The reason is, that the sale of the factor operates to create a contract between the principal and the purchaser, as well as between the factor and the purchaser. And the principal may interfere to protect his interest when he thinks it expedient. Such interference, however, is always made subject to all existing legal rights of the factor. If the buyer should, notwithstanding such notice on the part of the principal, pay the factor, the buyer would be protected so far only as the liens of the factor extended.

So in the case at bar, the agreement of the master operated to make or create a contract between the owners and the freighters, as well as between the master and the freighters.

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The master is the mere agent of the owners, removable at pleasure. He contracts on the personal responsibility of the owners, and has no remedy for his wages, as mariners have, against the ship. But inasmuch as he may hypothecate the ship, and the freight, and the cargo, for necessities in a foreign port, it has been held in Massachusetts and New York, contrary to the English decisions, that he has a lien upon the freight for necessary disbursements and expenses. And the able judge of the United States court of this district, has extended the claim also to his wages. See a very good note upon this subject in 3 Kent's Comm. (3d ed.) 167. But with the question, for what matters or claims the master may have a lien on the freight, we have, in the case at bar, no concern; for the master has been fully paid by the owners. They may, therefore, compel the payment of freight to themselves. The master, under these circumstances, has no more right to the freight money than he has to the ship. Both belong to the owners. And if there were any technical difficulty in the way of an action to be brought in the name of the owners, (which we do not perceive,) they would be permitted to sue in the name of the master, and recover for their own use. 3 Kent's Comm. (3d ed.) 138.

The opinion of the whole Court is, that the trustee be discharged.



JOHN BATTLES *et al.* versus ALPHEUS FOBES Junior.

In this action (of assumpsit), which was pending at the time when the Revised Statutes went into operation, and in which the statute of limitations had previously been pleaded, the plaintiff was not allowed to avoid the bar by bringing his case within the provision of the Revised Stat. c. 120, § 9, that if the debtor shall be absent from, and reside out of, the State, the time of his absence shall not be taken as a part of the time limited for the commencement of the action.

Eddy and *E. Whitman*, for the plaintiffs, cited *Foster v.*

Essex Bank, 16 Mass. R. 245 ; *Holden v. James*, 11 Mass. R. 396. Battles
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W. Baylies, for the defendant, cited Revised Stat. c. 146, § 5. [See *Bickford v. Boston and Lowell Rail Road Corp.* 21 Pick. 100 : *Sawyer v. Bancroft*, 21 Pick. 210 ; *Gay v. Richardson*, *ante*, 417.]

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF NORFOLK, NOVEMBER TERM 1836,
AT DEDHAM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,	
HON. SAMUEL PUTNAM,	
HON. SAMUEL S. WILDE,	} JUSTICES.
HON. MARCUS MORTON,	

JABEZ TALBOT *versus* LEMUEL GAY.

The defendant, being the payee of a negotiable note, payable in four annual instalments, indorsed it to the plaintiff, stating that he would guarantee it, and the plaintiff wrote over the payee's signature the words, "I order the within note paid to T. [the plaintiff] and guaranty the payment of the same," and the defendant assigned to the plaintiff a mortgage given as security for the note. No demand was made on the promisor to pay the note, and he remained solvent for six months after the last instalment became due, and was permitted to receive the profits of the mortgaged property for three years after that time; and notice of the non-payment two years afterwards was given to the defendant and a demand of payment made on him. It was *held*, that the defendant was a guarantee, and not a surety, and that he was discharged from liability by the laches of the plaintiff in not using due diligence to obtain payment from the promisor and not giving the defendant seasonable notice of the non-payment.

ASSUMPSIT against the defendant as indorser and guarantee of a promissory note, dated June 28th, 1824, for the sum of \$ 800, made by Ira Guild, and payable to the defendant or his order, in annual instalments, of \$ 200 each, on the first day of

April, 1826, 1827, 1828 and 1829, with interest. On the back of the note were written by the plaintiff, over the signature of the defendant, the following words : " I, the subscriber, order the within note paid to Jabez Talbot, and guaranty the payment of the same."

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At the trial, before *Putnam J.*, it appeared that Guild, at the time when the note was made, gave the defendant a mortgage of one third part of a factory in Sandwich, to secure the payment of the note ; that the defendant, at the time when the note was indorsed to the plaintiff, also assigned to him the mortgage ; that before he indorsed the note, he told Guild that he should guaranty the note, but that Guild must take care to pay it and not trouble him ; and that Guild, on the 7th of September, 1832, released to the plaintiff all his right, title and interest in the equity of redemption.

There was no evidence, that the plaintiff had ever demanded payment of Guild ; and it was agreed by the parties, that the plaintiff had never notified to the defendant, that the note was unpaid, nor demanded payment of him, until the 23d of December, 1834.

Guild, being called as a witness by the plaintiff, testified, that when the last instalment became due, he called upon the defendant and told him that he did not know that he should be able to pay any more on the note, and the defendant said " he was clear, though he guarantied it, because the plaintiff had not notified him ;" that the witness executed the release to the plaintiff, at the request of the defendant, who added, " do attend to this, for Mr. Talbot is continually harassing me about it ;" that the witness was the owner of one third of the factory at the time when the note was given, and he then purchased another third from the defendant ; that he continued to own two thirds until May 1829, when he sold one third for \$ 750 ; that he and his partners occupied the factory together until November 1829 ; that he continued to take the rents and profits of one third part thereof until the 7th of September, 1832, when he released it to the plaintiff ; that in April 1829, besides his share in the factory, he had property to the amount of about \$ 350, which was liable to attachment, and that he continued openly and visibly to hold the same until November 1829,

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when it was taken by his creditors ; and that since that time he had remained wholly insolvent.

A verdict was taken by consent for the plaintiff, for the amount due on the note, subject to the deduction of the value of the mortgaged property at the time when it was quitclaimed by Guild to the plaintiff, in 1832 ; but if the Court should be of opinion, that the jury would not be warranted in finding for the plaintiff, by reason of any laches on his part in not seasonably collecting the note, or demanding payment thereof and giving the defendant notice of the non-payment, then the plaintiff was to become nonsuit.

Nov 1st. *Mann and A. Prescott*, for the defendant, cited *Bayley on Bills*, (2d Am. ed.) 291, 292, 293 ; *Oxford Bank v. Haynes*, 8 Pick. 423 ; *Gibbs v. Cannon*, 9 Serg. & R. 202 ; *Overton v. Tracey*, 14 Serg. & R. 327 ; *Carver v. Warren*, 5 Mass. R. 545.

Hallet and Cleveland, for the plaintiff, cited *Bellows v. Lovell*, 5 Pick. 307 ; *Josselyn v. Ames*, 3 Mass. R. 274 ; *Moies v. Bird*, 11 Mass. R. 436 ; *Upham v. Prince*, 12 Mass. R. 14 ; *Allen v. Rightmere*, 20 Johns. R. 365 ; *Oxford Bank v. Haynes*, 8 Pick. 429 ; *Boyd v. Cleveland*, 4 Pick. 526 ; *Frye v. Barker*, 4 Pick. 382 ; *People v. Jansen*, 7 Johns. R. 338 ; *Cobb v. Little*, 2 Greenleaf, 261.

Nov. 4th. WILDE J. delivered the opinion of the Court. Upon the facts reported, we are of opinion, that this action cannot be maintained.

The contract of the defendant is clearly one of guaranty only, and is subject to the rules which govern that species of contract. This appears from the express terms of the contract, which cannot be construed so as to charge the defendant as a surety. The parties must be presumed to have known the distinction between such contracts, and to have framed the present contract with a full knowledge of the legal duties and liabilities imposed and undertaken thereby. The undertaking of a guarantee of a promissory note is conditional, and he will be discharged by the neglect of the holder to demand payment of the maker, and to give the guarantee notice of non-payment, provided the maker was solvent when the note fell due, and afterwards became insolvent. *Oxford Bank v. Haynes*, 8 Pick. 423 ,

Abbs v. Cannon, 9 Serg. & R. 202 ; *Phillips v. Astling*, 2 Taunt. 206. The same strictness of proof as to the demand and notice is not necessary to charge a guarantee, as is required to charge an indorser ; but the demand on the maker, if he be solvent at the time the note falls due, must be made in a reasonable time ; and if the holder shall unreasonably delay so long as to cause an injury to the guarantee, he will be discharged. *Warrington v. Furber*, 8 East, 242 ; *Nicholson v. Gouthit*, 2 H. Bl. 612.

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Now it appears clearly by the facts reported, that the maker of the note was solvent when it fell due, and if the plaintiff had used due diligence, it might have been secured by an attachment of his property. In addition to the mortgaged property, the maker was in the open and visible possession of other property liable to attachment, at the time the last payment on the note became due, and for a long time after. And besides, the plaintiff might have obtained payment wholly, or in part, out of the rents and profits of the mortgaged estate, if he had taken seasonable possession of it, as he ought to have done, instead of allowing the mortgager to continue for years to receive the rents and profits. It is clear, therefore, that the plaintiff is chargeable with gross laches ; as while he thus neglected to make any attempt to secure and collect the note of the maker, he made no demand of him, and gave no notice of the non-payment to the defendant. The maker has since become insolvent, so that the debt has been lost by the plaintiff's neglect, and the loss must fall upon him.

Judgment on nonsuit.

ZACHARIAH M. T. GODFREY *et al.* versus LEVI HUMPHREY.

A devise of "all my real estate," without words of limitation or inheritance, passes a fee simple.

WRIT of entry. Trial before *Putnam J.*

The demandants claimed as heirs of their grandfather, Zachariah M. Thayer, who died seised of the demanded premises in May, 1808.

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The tenant claimed under Thayer's will, dated May 8th, 1808, which, after providing for the payment of his debts out of his personal estate, and giving five dollars to each of his daughters, and a specific legacy to a niece, proceeded as follows :— " I do give and bequeath to my wife Sarah Thayer, all my real and personal estate of every description, she paying my just debts and legacies." The testator also appointed his wife to be executrix of his will.

It was agreed, that the wife of the tenant was the sister and sole heir of Sarah Thayer, who died in 1835 ; and that two thirds or three quarters of the demanded premises consisted of wild and uncultivated land.

A verdict was returned for the demandants, subject to the opinion of the whole Court upon the devise to Sarah Thayer. If the Court should be of opinion that it passed a fee, the verdict was to be set aside, and the demandants to be nonsuited ; but if it passed only an estate for life, judgment was to be rendered on the verdict.

Nov. 1st

Metcalf and Churchill, for the tenant, to the point, that the devise to the wife passed a fee to her by virtue of the word, " estate," cited *Murry v. Wyse*, Finch's Prec. Chanc. 264 ; S. C. 2 Vernon, 564, and notes ; Bac. Abr. *Legacies & Devises*, C ; *Cole v. Rawlinson*, 1 Salk. 234 ; *Holdfast v. Marten*, 1 T. R. 411 ; 4 Dane's Abr. 608 ; *Bridgewater v. Bolton*, 1 Salk. 236 ; S. C. 6 Mod. R. 109 ; *Sharp v. Sharp*, 6 Bingh. 630 ; *Doe v. Langlands*, 14 East, 370 ; *Baker v. Bridge*, 12 Pick. 31 ; Revised Stat. c. 62, § 4 ; *Wright v. Denn*, 10 Wheaton, 235 ; *Morrison v. Semple*, 6 Binney, 94 ; *Jackson v. Housel*, 17 Johns. R. 282 ; *Roe v. Bacon*, 4 Maule & Selw. 369.

S. D. Parker, for the demandants, cited *Bowes v. Blackett*, 1 Cowp. 235 ; *Chester v. Painter*, 2 P. Wms. 335 ; *Doe v. Fyldes*, 2 Cowp. 840 ; *Roe v. Holmes*, 2 Wils. 80 ; 2 Preston on Est. 69, 78 ; 8 Viner's Abr. 237 ; *Doe v. Buckner*, 6 T. R. 610 ; *Kellett v. Kellett*, 3 Dow, 248 ; *Timewell v. Perkins*, 2 Atk. 102 ; *Shaw v. Bull*, 12 Mod. 594 ; *Frogmorton v. Wright*, 3 Wils. 418 ; *Doe v. Baines*, 2 Crompt Mees & Roscoe, 23 ; *Lambert v. Paine*, 3 Cranch, 97.

SHAW C. J. drew up the opinion of the Court. The single question in this case is, whether the devise of the testator, Z. M. Thayer, to his wife, gave her an estate in fee simple, or an estate for life only, in the premises in controversy.

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It is scarcely necessary now to repeat the familiar rule of law, that in a will, the word "*heirs*," or other express words of inheritance, are not necessary to create an estate of inheritance in the devisee; but if by the terms of the devise, expounded with reference to all the other provisions in the will, it appears affirmatively, that it was the intent of the testator to give an estate in fee simple, the devise will be so construed, as to pass such an estate. *Baker v. Bridge*, 12 Pick. 27. Though if such an intent cannot be found in the will, either expressed or implied in its terms, or drawn by fair inference from other manifest intentions expressed in the will, then, in favor of the heir at law, it must be construed to pass only an estate for life. *Farrar v. Ayres*, 5 Pick. 404; *Kellett v. Kellett*, 3 Dow, 248.

The Court are of opinion, that this devise to the wife passed an estate in fee, without words of limitation, by force of the word "estate."

It has long been held, that the devise of all a man's estate, where there are not words to control or restrain its operation, shall be construed not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance, if he has one. *Carter v. Horner*, 4 Mod. 89; S. C. 1 Eq. Cas. Abr. 177.

Sometimes the word "estate" is enumerated with others, all descriptive of personal or chattel interests, so as to exclude real estate. Sometimes it is used as a word of mere local description, as, *my estate at such a place*. But where it can be construed to intend all one's real estate, without restriction, it carries a fee. *Holdfast v. Marten*, 1 T. R. 411.

In the case cited by the counsel for the demandants, *Bowes v. Blackett*, Cowper, 235, the testator gave all his lands, &c., and all his estate and interest in them, to his wife for life. Of course, under this express limitation, the use of the word "estate" could have no effect. But in the devise to his sisters no such word was used. This was remarked by Lord Mans

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field, in giving the opinion of the Court, implying that had these words been used, without limitation or restriction, in the devise to the sisters, they would have carried a fee. In a very recent case, *Doe v. Baines*, 2 Crompt. Mees. & Roscoe, 197, the devise was "of all and singular my lands, &c. to be truly possessed and enjoyed"; and it was held not to pass a fee, upon the known distinction between "all my lands," and "all my estate."

This opinion renders it unnecessary to consider the other grounds upon which it is contended that this devise passed a fee, as, that it contained a personal charge on the devisee for the payment of debts and legacies, on failure of personal property, and that the estate consisted in part of wild lands; grounds, which if the question depended upon them, would be entitled to great consideration.

Verdict set aside, and demandants nonsuit

AMOS LOVERING *versus* CHARLES M. FOGG.

An agreement made upon the sale of land, that the vendee shall not sell it without first offering it to the vendor, does not preclude the vendee from mortgaging the land to a third person, to secure the payment of a debt, without making such offer. Where such vendee gave an absolute deed of the land to a creditor, with notice of such a contract, upon his agreeing, verbally, to execute a bond to reconvey the same on receiving payment of the debt, it was *held*, that the subsequent execution of the bond related back, so that as between the parties themselves the deed and bond constituted a mortgage, and that the original owner, therefore, was not entitled to a decree for a specific performance of the contract to reconvey.

THIS was a bill in equity setting forth, that the complainant, on the 24th of June, 1833, being seised in fee of a lot of land in Medway, of the value of \$50, which he was willing to sell and convey, for less than its real value, to the defendant Fogg, as a site for buildings for his own use as a mechanic, conveyed the same to Fogg for the sum of \$25; that Fogg, at the same time, and in consideration of such conveyance, executed a contract in writing with the complainant, whereby it was agreed, that if Fogg should ever sell the land, the complainant should have the first offer, and should have the land, provided he would give as much therefor as any other person, and not "other

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wise ; that such agreement was duly recorded in the registry of deeds ; that the complainant had always been ready to pay Fogg as much money for the land as any other person would give therefor, and has often requested Fogg to convey it to him, in case he should convey it to any person ; but that Fogg, on the 16th of March, 1835, without first offering the land to the complainant, sold and conveyed it in fee simple to Cutler Partridge, the other defendant ; that Partridge, at the time when he received such conveyance of the land, knew of the agreement made between Fogg and the complainant, and that Fogg had no right to convey the same to Partridge ; and that as this transaction between the defendants was secret, the complainant does not know exactly what sum of money was paid or agreed to be paid as the consideration of such sale, but that he believed it to be about the sum of \$ 50 ; that he has frequently called on the defendants to inform him what sum was actually paid or agreed to be paid as the consideration of the sale, and has frequently offered to pay to Partridge such sums of money as he has paid on account of the land, and to perform any agreement which he has made for the payment of any further sums on account thereof, and has also frequently demanded of Partridge to convey the land to him : wherefore, the complainant prays, that the defendants may be compelled to make discovery, &c. and to perform specifically the agreement between the complainant and Fogg.

The answer of the defendant Fogg admits the existence of the agreement between himself and the complainant, but avers, that on the 16th of March, 1835, the land was under attachment in a suit against the respondent for the sum of about \$ 50, exclusive of costs, and that on the same day he was indebted to Partridge in the sum of \$ 300, a part of which was lent him by Partridge to remove the attachment, and that it was agreed between him and Partridge, that he should give to Partridge a mortgage of the land to secure payment of the sum due to Partridge ; that the respondent then gave Partridge an absolute deed of the land, under an engagement then made to him by Partridge, that he would give the respondent a bond to reconvey the same, on his paying that sum with interest ; that Partridge did afterwards, in pursuance of his agreement, execute

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such a bond bearing even date with the deed to him, which bond is now in the respondent's hands ; that the respondent, at the time when such deed was given, was informed and believed that the deed and bond constituted a mortgage, agreeably to his intention, and to the agreement originally made between him and Partridge ; that he has since paid to Partridge about one third part of the sum secured by the deed ; that the respondent did not wish or intend to sell the land in any sense which he attached to the promise made by him to the complainant ; that he intended and expected, and still intends and expects, to redeem the land ; and that he intends if he should ever desire or be obliged to sell the land, that the complainant shall have it, provided he will give as much therefor as any other person.

The answer of Partridge admits, that at the time when Fogg conveyed the land to him, Fogg informed him that he had engaged to give the complainant the first offer of the land, but denies that it was ever the intention or wish of the respondent that the land should become his own ; avers, that when he received the deed, he expected, and had no reason to doubt, that Fogg would redeem the land by paying the debt secured thereby ; and denies that the complainant ever requested the respondent to convey the land to him.

The complainant filed a general replication.

Nov. 4th.

Leland, for the plaintiff.

Metcalf, for the defendants, denied that the agreement between the plaintiff and Fogg had been broken. The transaction between the defendants was not a sale, but a mortgage. In chancery it is clearly a mortgage, and would probably be so regarded at law. *Bac. Abr. Mortgage, B ; Blaney v. Bearce, 2 Greenleaf, 132.* A decree for specific performance in this case, would do manifest injustice to Fogg. It would prevent his redeeming the land, and frustrate the object of his original purchase.

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SHAW C. J. drew up the opinion of the Court. The plaintiff has filed his bill in equity against the two defendants, to enforce the specific performance of an agreement. The Court are of opinion, that the true nature and purpose of this agreement were to give to the plaintiff, from whose estate the land was taken, and with which it may be presumed to be con

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nected, a right of pre-emption, in case of a final alienation, so as to prevent the letting in of a stranger. But this could not be intended to restrain the defendant from all or any of the uses of his property, incident to the ownership, except on an offer to the plaintiff before a sale and alienation. It could not prevent him from mortgaging it to raise money. Had it been passed by a process *in invitum*, as an attachment and levy of execution on an adverse judgment, it is, to say the least, very questionable whether it would have come within the terms of the agreement. If indeed an attachment and levy, or a judgment at law, had been resorted to by mutual consent, as in case of a fine, it might have been deemed a sale and alienation. But the Court are of opinion, that the deed from Fogg to Partridge was, in effect, good as a mortgage between them. When the deed was originally given, absolute in its form, but with an agreement, made in good faith, that a defeasance should be executed, on request, when such defeasance was executed, in good faith, it related back to the deed, and made it a mortgage. Had the estate been attached as Partridge's, in the mean time, it might be attended with difficulties, but they do not now arise. When the absolute deed was first made, there was a sufficient agreement, to constitute a defeasance ; but it was not proved and manifested, in the manner required by law, by inserting it as a condition in the original, or by a separate deed. Where the delay of the defeasance does not affect third persons, the defeasance, when made, is good between the parties. This being a security for money, and not a sale or alienation of the estate, we think the *casus fœderis* had not occurred, that the plaintiff had no right to call for a specific performance of the agreement, and that the bill must be dismissed with costs.

The Inhabitants of FRANKLIN *versus* The Inhabitants of DEDHAM.

If, in order to show that a person was prevented from gaining a settlement in a town, by being warned to leave within one year after he came to reside there, pursuant to St. 4 W. & M. c. 13, and St. 12 & 13 Will. 3, c. 10, it be proved merely, that such a warrant was issued, served and returned to the Court of Sessions, it cannot be presumed, in the absence of all other evidence upon the subject, that the return on such warrant certified that he was warned within one year after he came to reside in such town, although the first mentioned statute required, in such case, that the time of the abode of the person warned, in the town, and when the warning was given, should be returned.

THIS was an action to recover compensation for the support of Eunice Allen, whose legal settlement was alleged to be in the town of Dedham.

At the trial, before *Putnam J.*, it was admitted that the pauper derived her legal settlement from her grandfather, Daniel Haven; and it appeared, that he was taxed in Dedham for his poll in 1762, and that he afterwards lived in that town for many years, and until his death. There was no other evidence as to the time when he came to reside in Dedham.

The defence set up was, that Daniel Haven was duly and legally warned to depart from Dedham within one year from the time when he came to reside there.

The defendants proposed to prove, from the records of the town, "that, on the 17th day of January, 1763, a warrant was issued for the warning of Daniel Haven and Hannab, his wife, and a negro woman, named Lettis, and John Fisher, to depart from the town, and that the warrant was given to Jeremiah Bacon, and that, on the 28th day of March of that year, an order was granted to Jeremiah Bacon, late constable, for 7s. 8d., for warning sundry persons to depart this town." It did not appear from such records, that any other warrant was delivered to Bacon to warn out other persons in the years 1762 and 1763, when he served as constable.

It was certified by the clerk of the courts in the county of Suffolk, that on a careful examination, the warrant in question could not be found; that no warrants for the warning out of any persons from the towns in the county of Suffolk, of which

the county of Norfolk then formed a part, could be found on the files or among the papers for the years 1762 and 1763 ; and that the files and papers for those years were in great disorder.

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This evidence, which was all that the defendants proposed to offer, was rejected ; and a verdict was taken for the plaintiffs, by consent.

If the Court should be of opinion, that this evidence was legally admissible, and that the jury would have been warranted thereupon, in presuming that the warning out of Daniel Haven was legal, then the verdict was to be set aside and a new trial granted ; otherwise judgment was to be rendered according to the verdict.

The case was argued in writing.

Richardson, for the defendants, said that by the law as it stood in 1762 and 1763, any person residing in a town for the space of one year, not having been warned to depart the same according to law, thereby gained a legal settlement in such town ; and that to make such warning out legal, a warrant must have been issued by the selectmen, directed to a constable of the town, or some other person, and it should appear on the warrant or on the return, how long the person warned out had resided in the town and when he was warned to depart, and it should also appear, that the warrant was duly returned into the office of the clerk of the court of General Sessions of the Peace for the county ; *Hamilton v. Ipswich*, 10 Mass. R. 506 ; and that the evidence offered was sufficient to substantiate these facts. *Rex v. Haslingfield*, 2 Maule & Selw. 558 ; *Williams v. East India Co.*, 3 East, 191.

Metcalf for the plaintiffs, cited *Rex v. Haslingfield*, 2 Maule & Selw. 558 ; 3 Stark. on Evid. 1250 *et seq.* ; *Sutton v. Uzbridge*, 2 Pick. 436.

SHAW C. J. drew up the opinion of the Court. To enable the plaintiffs to recover, they must prove that the pauper had a derivative settlement in Dedham. This they propose to do, by proving the settlement there of her grandfather, Daniel Haven. It is conceded, that if he ever gained a settlement there, it was transmitted to the pauper, his granddaughter, she never having acquired any settlement in her own right or otherwise.

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It appears from the report, that Daniel Haven resided more than one year in Dedham prior to April 10th, 1767, namely, from the spring of 1762 for many years, and until his death. By the laws then in force, he thereby acquired a settlement, unless he was duly and legally warned out, within one year from his coming to reside there, pursuant to the provincial acts of 4 *W. & M.* c. 13, and 12 & 13 Will. 3, c. 10.

The residence for one year prior to April 1767, is *primâ facie* evidence to fix the settlement of Daniel Haven, and must stand as full proof, unless it is shown by the defendants, that he was warned out within one year from the commencement of that residence. It is contended, that in the absence of the warrant and return, and on the evidence of the disorder of the files, to account for that absence, the evidence from the town records, of the issuing of a warrant, of its delivery to a constable and the allowance of fees to the same officer, soon after, for warning out sundry persons, there being no proof of any other warrant delivered to him, is evidence from which a jury might infer that a warrant was duly issued, served and returned, and in due and legal form. Were this fully conceded, it would fall short of establishing the defendants' case. The burden of proof is upon the defendants, to show, that the pauper was warned within one year after he came to reside, &c. This last is a separate and independent fact, upon the proof of which the whole efficacy of the warning depends. The statute required, that the names of the persons warned, the time of their abode in the place, and the time when the warning was given, should be returned to the Court of Sessions. Such fact being stated in a return made pursuant to the statute, would have been *primâ facie* evidence of the fact. But does the proof, that a warrant was duly issued and served, and returned by a ministerial officer, raise a presumption, that the return certified the truth of a particular fact, which he was bound to inquire into and to certify according to the truth, of which there is now no proof *aliunde*, and which he not only could not return, but which it would have been a breach of his duty to return, if on inquiry he found it not true in fact? Had this fact never been proved by other evidence, perhaps it would avail the defendants, either as substantive proof of the fact necessary to his case,

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or as raising the presumption, that it would be found in the officer's missing return, if it should be held that such return is the only proper evidence. But the evidence, that the pauper was first taxed in May, 1762, only proves affirmatively, that he was then resident there, not that he had not been resident there even for years previous. The evidence offered tends to show, that the warrant was issued on the 17th of January, 1763, and was served before the 28th of March of the same year. The pauper might have been residing there in May, 1761, without being taxed, or he might have come to reside soon after May, 1761, so that more than a year might have elapsed before the date of the warrant, January 17th, 1763. The warrant, therefore, may have been rightfully issued, served and returned, without affording any presumption, that it certified the particular fact, that the pauper came to reside there within a year preceding. The officer would have done his duty, by making his return conformable to the truth.

The argument then must depend upon this, that it is not to be presumed, that the selectmen would issue their warrant for this purpose, unless it was within the year. But this would be carrying presumption very far. Residence or domicile is often an extremely difficult question of fact, depending on a combination of circumstances. A man may come to reside in a town for a mere temporary purpose, as a laborer, afterwards bring some of his family, afterwards others, and at last take a house, or become a boarder. The commencement of such residence it would be difficult to settle. The selectmen, in the course of their municipal year, find a new name on the tax list ; they issue their warrant to the proper officer, to give the statute warning *valeat quantum*. If seasonable, which will be determined by his return, it will avail the town in case of need ; if otherwise, no inconvenience arises from it, except the trifling cost of the service. That considerable time was deemed necessary to enable selectmen to discover who had come to "sojourn and dwell" in their towns, and take the necessary measures, is shown by the second of the provincial statutes cited above, which enlarges the time from three months to twelve. *Hamilton v. Ipswich*, 10 Mass. R. 506 ; *Sutton v. Uxbridge*, 2 Pick. 436. The reasoning in the last cited

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case is precisely applicable to the present, and is decisive. But supposing that the present case should be considered as carrying the proof somewhat further, by showing from the town records, the issuing of a warrant and the payment of fees for its service, supposing it presumed from these facts, that the warrant was rightly served and returned, it would afford no presumption of the return of a fact, of which there is no other proof or presumption, and which is essential to the defendant's case, to wit, that Haven came to sojourn and dwell in the town, within twelve months next preceding.

Judgment on the verdict for the plaintiffs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF ESSEX, NOVEMBER TERM 1836,
AT SALEM.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

CHARLES VALENTINE *versus* NATHAN BROWN.

Where the owner of a large number of barrels of beef, all of equal value and all in one parcel, sold a certain number of them to the plaintiff and received the price, and a certain number to B., and reserved the rest for himself, and delivered them all to the agent of the vendees, and afterwards B. took away the number sold to him, and the vendor took away the number reserved, it was *held*, that upon such separation the barrels remaining in the hands of such agent became vested in the plaintiff, and that he might consequently maintain trover therefor against a person who took away and converted the same.

TROVER for twelve barrels and fifty half-barrels of beef.
Trial before *Putnam J.*

It appeared that the defendant, who was a deputy sheriff, attached the beef on the 14th of April, 1834, on a writ against Samuel Titcomb, and sold it.

The plaintiff offered in evidence a receipted bill of sale of the beef to himself from Titcomb, dated November 29th, 1833; and an accountable receipt, dated November 28th,

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1833, signed by Titcomb, certifying that he had in his possession twenty-six barrels and fifty half-barrels of beef, which he promised to deliver to the plaintiff or his order, free of expense, in five months, fire excepted, or to pay him therefor, at certain rates, and that such beef was stored in a cellar therein specified.

The plaintiff called S. W. Marston, Esq. as a witness, who testified, that on the 25th of November, 1833, he received a bill of sale from Titcomb to B. Burgess & Son, of one hundred barrels of beef, which were to be held as collateral security for the payment of a debt due to them from Titcomb, which had been left with the witness for collection; that Titcomb gave him the key of the cellar where the beef was stored, in order that he might hold the beef as such security; that he afterwards received a letter from the plaintiff, dated the 5th of December, 1833, containing the following words: "Enclosed you have a certificate and a copy of a bill of beef bought of Samuel Titcomb. Whenever this will bring cost, cash, I wish it sold, or let Mr. Titcomb have it by paying cash; this is the understanding. The beef is stored with the lot you have possession of, for Benjamin Burgess & Son. I wish you to keep the beef in your possession until cash is received for it;" that Titcomb, upon being informed that the plaintiff had requested the witness to take possession of the beef sold to the plaintiff, told the witness he might take possession of it for the plaintiff and dispose of it as the witness pleased; that the witness then held the key, with Titcomb's knowledge, for the purpose of keeping possession for Burgess & Son and for the plaintiff; that immediately after thus taking possession for the plaintiff, the witness went to the person having charge of the cellar, to hire the storage of the beef sold to the plaintiff, and did hire the storage accordingly, and such person charged and the witness paid for the storage up to the time when the beef was attached by the defendant; that the debt due to Burgess & Son not having been paid, one hundred barrels of beef were, on the 28th of January, 1834, at their request, taken out of the cellar for them and deposited in another place; that the witness took such barrels as he pleased for Burgess & Son, and that Titcomb did not assist him, but assented to his so

taking them ; that after the beef of Burgess & Son was removed, Titcomb applied to the witness for the key of the cellar, saying that he had beef there, other than that which he had sold to the plaintiff, and which he wished to sell ; that the witness lent him the key accordingly, and it was returned to the witness, and he held it at the time of the attachment ; that the witness, having heard of the attachment, went with the defendant to the cellar and found there all the beef which was attached, but fourteen barrels were missing ; that the beef was branded with the Boston inspection mark ; that there was no separation of the barrels sold to the plaintiff, or to Burgess & Son, and that the witness never understood that any thing more was to be done by Titcomb, to convey the beef to the plaintiff, by weighing or separating or selecting ; and that there were between one and two hundred barrels of beef more than the number sold to Burgess & Son.

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Another witness, a dealer in beef, testified, that a purchaser has no motive for selecting one barrel of the beef so branded, rather than another.

Judgment was to be rendered for the plaintiff, if the Court should be of opinion that the evidence was sufficient to sustain a verdict in his favor.

Cushing, for the defendant, to the point, that the plaintiff had not so separated and individualized his portion of the beef as to enable him to maintain this action, cited *Saunders on Pl. & Evid.* 873 ; *Young v. Austin*, 6 Pick. 283 ; *Busk v. Davis*, 2 Maule & Selw. 397 ; *Shepley v. Davis*, 5 Taunt. 617 ; *McDonald v. Hewett*, 15 Johns. R. 349 ; 2 Kent's Comm. (2d ed.) 496 ; *Barrett v. Goddard*, 3 Mason, 111.

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Choate, for the plaintiff, cited *Macomber v. Parker*, 13 Pick. 175 ; *Young v. Austin*, 6 Pick. 280 ; *Damon v. Osborn*, 1 Pick. 476 ; *Brown on Sales*, 391 ; 2 Kent's Comm. (1st ed.) 393 ; *Ryall v. Rolle*, 1 Atk. 171.

SHAW C. J. delivered the opinion of the Court. The main question in the present case is, whether the plaintiff had acquired such a title in the beef described, as to enable him to maintain an action of trover. The circumstances of the case are somewhat peculiar, and upon those circumstances we are of opinion, that the plaintiff has made a legal title.

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In the first place, there was a good contract of sale, made upon good consideration and without fraud. The vendor had the quantity at the time, corresponding in description with that sold, but mingled with a larger parcel. The bill of sale on the face of it, purports a delivery ; but, perhaps, taken in connexion with the receipt admitted to have been given by Titcomb at the same time, it may be inferred, that no constructive or other delivery was made. But as the price was paid at the time, the vendor had no lien for the price, and no other right of possession ; and, therefore, the right of possession followed the right of property, and nothing remained to make the property complete, but an actual or constructive delivery and a separation of the part sold, from the mass. The provision, that Titcomb would keep these barrels of beef, five months without expense, and then deliver or pay for them, was a stipulation for the benefit of the plaintiff, and did not prevent him from demanding possession sooner. But if it were otherwise, and if Titcomb had any right to retain possession, he waived it by giving up the possession to the plaintiff's agent. When, therefore, Titcomb, upon the plaintiff's request, delivered the larger parcel to the plaintiff's agent, upon a demand of the plaintiff's goods, it constituted a good constructive delivery ; nothing remained but to separate the number of barrels belonging to each, they being all of equal value, in order to enable the plaintiff to have the specific barrels intended to be sold. And this delivery of the larger parcel, upon this demand and for this purpose, gave the authority to the plaintiff or his agent to make such separation. Whilst they so remained in the plaintiff's custody, the other purchaser, to wit, Burgess & Son, took their one hundred barrels, with the consent of the other parties, and Titcomb took what he claimed, and those which were left were thus effectually separated and remained as the plaintiff's under the contract. He then acquired a complete property in the specific and individual barrels and half-barrels, for which the action was brought. It is found that by some means enough were not left for him ; but this does not impair his right, to those which were left. If 500 bushels of corn be sold out of a larger parcel, say 1,000 bushels, and the vendor receives storage until the vendee shall have the part purchased sepa

rated, if the vendor sells the other 500 to another purchaser, and it is measured and delivered, the vendor holding the 500 on storage for the first purchaser, this is as effectual a separation to vest the specific 500 bushels in the first purchaser, as if the 500 had been first measured and delivered to the first purchaser; it being understood, however, that in all other respects there had been enough done, to vest the property and right of possession in the vendee, by a contract of sale, a payment of the price, and a constructive delivery.

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Such separation having been effected in the present case, in the events which have happened, before the attachment made by the defendant, we are of opinion, that the plaintiff had the complete property and right of possession in the goods attached, and that he may, therefore, maintain this action.

SUEL WINN *versus* REBECCA CABOT.

A grantor conveyed all his farm in S. bounded, &c. also six acres of woodland, described by bounds, "being the same farm whereof M. died seised, and which the heirs of M. conveyed to me by two deeds recorded," &c. It was *held*, that the woodland passed to the grantee, although it was never owned by M. nor conveyed by his heirs to such grantor.

WRIT of entry to recover a wood lot in the "Six hundred acres," so called.

The parties stated a case.

The demandant claimed the premises under an execution against Benjamin Wilson, which was duly extended thereon, in 1820.

On the 12th of August, 1815, Wilson, being seised of the demanded premises and of other lands in Saugus, executed a deed, by which he mortgaged to the tenant, "all that my farm situated in Saugus," &c. "containing about eighty acres of land, be the same more or less," &c. "bounded easterly," &c. "and southerly, on the Six hundred acres, so called. Also six acres of woodland [the demanded premises] in said Six hundred acres so called, bounded easterly and northerly on the range lines, westerly on Joseph Eaton, and easterly on John Ballard, or however otherwise the premises are bound-

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ed ; being the same farm whereof Thomas Mansfield, late of Lynn, died seised, and which the heirs of said Thomas conveyed to me by two deeds recorded," &c. "reference being thereunto had."

It appeared, that the demanded premises were conveyed to Wilson by Joseph Sweetser, on the 25th of November, 1805, and were never owned by Mansfield ; that, in 1812, Wilson sold to one Oliver a small parcel of the farm, which had been conveyed to him by the heirs of Mansfield ; and that in 1814 he conveyed to the Lynn Wire Company, another parcel thereof containing between eight and nine acres.

If the Court should be of opinion, that the demanded premises passed by the mortgage deed, the demandant was to become nonsuit ; otherwise, the tenant was to be defaulted.

Nov. 6th,
1835.

Saltonstall and *B. Merrill*, for the tenant, cited *Jackson v. Clark*, 7 Johns. R. 217 ; *Worthington v. Hylyer*, 4 Mass R. 196 ; *Child v. Fickett*, 4 Greenl. 471 ; *Willard v. Moulton*, 4 Greenl. 14 ; *Vose v. Handy*, 2 Greenl. 322 ; *Drinkwater v. Sawyer*, 7 Greenl. 366.

Choate, for the demandant.

May term
1837.

WILDE J. afterward drew up the opinion of the Court. The only question in this case is, whether the demanded premises passed to the tenant by the mortgage deed, under which she derives her title. By that deed Wilson conveyed all his farm in Saugus ; and, after bounding it, the following clause is added : "also six acres of woodland in the Six hundred acres, so called, bounded easterly and northerly on the range lines, westerly on Joseph Eaton, and easterly on John Ballard, or however otherwise the premises are bounded, being the same farm whereof Thomas Mansfield, late of Lynn, died seised, and which the heirs of said Thomas conveyed to me by two deeds recorded, &c. reference thereto being had."

On the part of the demandant, it is contended, that this special and particular reference must control the previous description, and is decisive to show that the wood lot was not intended to pass, as it never was the property of Mansfield, but was conveyed to Wilson by one Joseph Sweetser. But it seems to us very clear, that taking the whole description of the mortgaged premises together, there can be no doubt that

the wood lot did pass by the mortgage deed. The first part of the description describes the farm by metes and bounds ; then follows a description of the wood lot ; and, in conclusion, a reference is made to the grantor's deed from the heirs of Mansfield, which include the land first described, being the principal part of the premises mortgaged, but do not include the wood lot. But this lot was expressly included in the mortgage and described, and the mistake appears to be in supposing the mortgager derived his title from the heirs of Mansfield : unless the wood lot was considered as no part of the farm, which was, perhaps, so understood ; and if so, there is no inconsistency in the description of the granted premises, and the reference to the deeds from the heirs of Mansfield. The mortgage deed first describes a farm *eo nomine*, then a wood lot, and then concludes as before recited, " being the same farm," &c. But however this may be, we are of opinion that the mistake, if any there were, was in the reference to the mortgager's title deeds, as the wood lot was expressly granted.

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Demandant nonsuit

JOEL BOWKER *versus* STEPHEN HOYT *et al.*

If the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part ; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfil his contract.

ASSUMPSIT for 410 bushels of corn, sold and delivered on and between the 6th and 9th of May, 1835. The writ was dated May 12th, 1835. Trial before Putnam J.

The plaintiff proved the delivery of 410 bushels of corn, the price of which was 85 cents per bushel, and amounted to the sum of \$ 348.50.

The defendants, Hoyt & Kimball, contended that there was a special contract for the sale of 1000 bushels, and that the quantity delivered was in part performance of such contract.

It appeared that the plaintiff made out a bill against the de-

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defendants for 500 bushels at 85 cents per bushel, and presented it to Kimball on the 8th of May; that Kimball examined it, and said he would show it to his partner, Hoyt, who would settle it; that on the 11th of May, a dispute arose between the parties in regard to the contract in question, the plaintiff contending that it was for the sale of 500 bushels only, and the defendants, that it was for the sale of 1000 bushels; that the plaintiff, at that time, offered to let the defendants have 90 bushels more than had been delivered, to make up the 500 bushels; but that Hoyt claimed the residue of 1000 bushels, and told the plaintiff, that if he would not let him have enough to make up 1000 bushels, he would not take any more; and that the plaintiff refused so to do. It was admitted, that the sale was to be a cash transaction; and that the defendants had retained the corn which the plaintiff had delivered, without offering to return the same.

The plaintiff contended, that he was entitled to a verdict for the value of the corn delivered, even if he had broken his contract before the action was commenced, inasmuch as the defendants had retained the corn so delivered. The defendants contended, that the plaintiff was by law bound to perform, or offer to perform, his contract, before he was entitled to maintain an action for a part of the corn delivered, and that he should be required to deliver, or offer to deliver, the remainder of the 1000 bushels, before he could, upon the facts proved or admitted, maintain any action for what had been delivered.

The jury found, that the contract was for the sale of 1000 bushels, and returned a verdict for the defendants.

Judgment was to be rendered upon the verdict, or the verdict was to be altered to a verdict for the plaintiff for the sum of \$348.50, according to the opinion of the Court.

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Choate and Thorndike, for the plaintiff, cited *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Congr. Meetinghouse in Lowell*, 8 Pick. 178; *Oxendale v. Wetherell*, 9 Barn. & Cressw. 386; *Shaw v. Badger*, 12 Serg. & R. 275; *Bragg v. Cole*, 6 J. B. Moore, 114; *Roberts v. Havelock*, 3 Barn. & Adolph. 404; *Dox v. Dey*, 3 Wendell, 356; *Hill v. Green*, 4 Pick. 114; *Champion v. Short*, 1 Campb. 53; *Shipton v. Casson*, 5 Barn. & Cressw. 378.

Saltonstall, for the defendants, cited *Stark v. Parker*, 2 Pick. 266 ; 2 Phill. on Evid. 83 ; *Waddington v. Oliver*, 5 Bos. & Pull. 61 ; *Walker v. Dixon*, 2 Stark. R. 281.

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WILDE J. afterward drew up the opinion of the Court. It is a well established principle, that on an entire contract for the sale and delivery of a specific quantity of goods, the vendee is not bound to receive part, and though part be delivered, he is not liable to pay for the same, if he offers to accept and pay for the whole, and the vendor refuses on his part to fulfil the contract.

But if the vendee accepts the delivery of a part, and promises to pay, the vendor may recover the price of the part delivered, although he afterwards refuses to fulfil the contract, unless the vendee shall have returned the part delivered.

The case of *Oxendale v. Wetherell*, 9 Barn. & Cressw. 386, was assumpsit for 130 bushels of wheat sold and delivered ; and it appeared, that the plaintiff had contracted for 250 bushels of wheat to be delivered in six weeks ; and it was held, that the defendant, having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same. The case of *Champion v. Short*, 1 Campb. 53, was decided on the same principle, where it was held, that on a joint contract for the sale and delivery of several articles of merchandise, the vendee was precluded, by the acceptance of any one article, from saying that the sale was entire, and he was held responsible for the article received. A similar decision by *Hale C. B.* is cited in a note, who held that though the agreement in that case was entire, the several deliveries proved made several contracts. The case of *Bragg v. Cole*, 6 J. B. Moore, 114, was also decided on the same principle ; and the same principle is laid down in *Shaw v. Badger*, 12 Serg. & R. 275.

The principle established by these cases is founded on manifest justice, and is decisive of the present case. The defendants accepted the 410 bushels of corn, and promised to settle the account therefor ; and if there had been no such promise, the acceptance of the corn was a severance of the entirety of the contract, and the defendants were bound to pay for the corn delivered ; for the case finds that it was to be a cash trans-

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action. From this liability the defendants could not be released by the failure of the plaintiff afterwards to deliver the rest of the corn, without returning to him the corn delivered ; and, as the corn was not returned, the plaintiff may well maintain his action ; but the defendants may reduce the plaintiff's claim, by showing any damages they have received by the plaintiff's failure to fulfil his contract ; and thus substantial justice may be done, without subjecting the defendants to the necessity of bringing a cross action.

Verdict set aside, and a new trial granted.

JONATHAN SHOVE *versus* CALEB WILEY.

Evidence that the indorser of a note was frequently at a certain bank, transacting business there, and that he frequently paid notes there, was *held* sufficient proof of his being conversant with the usage of the bank to give notice to promisors to pay at the bank, instead of sending the notes to them and demanding payment.

A book kept by a bank, in which a clerk regularly entered certificates of his having given notices to the makers and indorsers of promissory notes, taken in connexion with his testimony that it was his practice to carry the notices personally to the house or place of business of the parties, and that he has no doubt they were carried as usual, in the case of a certain note mentioned in the book, though he has no recollection in relation to such note, is competent and sufficient evidence to prove that notices were so given in the particular case.

Where such clerk produced a printed form, in common use, and testified to his belief that the notices in question were in the same form, it was *held* to be competent and sufficient evidence of this fact.

THIS was an action, commenced on the 7th of September, 1835, by the indorsee of a promissory note made by William B. Breed, to the defendant or order, and by him indorsed, dated the 11th of November, 1828, for \$ 120, payable in ninety days. Pleas, the general issue and the statute of limitations.

At the trial it appeared, that Breed and Wiley were residents in Lynn at the time when the note became due.

E. S. Davis testified, that on the 12th of February, 1829, he was a clerk in the Lynn Mechanics Bank ; that by referring to the records of the bank he finds the following notice entered by himself, viz. " Lynn Mechanics Bank, Feb. 12, 1829. I this day notified Wm. B. Breed, drawer, and Caleb Wiley,

indorser, or, a note of 120 dollars, due this day, the last of grace. Attest, E. S. Davis"; that it was his practice to carry the notices himself to the residence or place of business of all the parties resident in town, and he had no doubt that notices of the non-payment of this note were carried as usual, as he was very careful to notify the parties and to make a record of it; that he could not recollect any thing in relation to this particular note, but he believed he did not fail to notify the parties in any case; that he always left Wiley's notices at his store, and Breed's at his house; that he carried the notices after the bank closed and entered them the next morning; that he generally wrote the records on the day that the note was due, and signed them after he had carried the notice; that the bank had a form of notice printed, with blanks for the date, amount and name, and he supposed this form was used in respect to the note in question; that it was not the practice of the bank to present the note to the promisor on the day the note became due, before notifying the indorser; that he thought the defendant was conversant with the usages of the bank; that at the time when these notices were given, the defendant was frequently at the bank and had notes becoming due there.

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J. W. Proctor testified that on the 1st of February, 1834, the plaintiff requested the defendant to pay the note; and that the defendant admitted that he indorsed it, and said that if the plaintiff could prove that he had been duly notified, he would pay it.

One Chase testified, that the Lynn Mechanics Bank was the only bank in Lynn in 1828; that the defendant did a portion of his business there, but he did most of it at a bank in Salem; that the witness recollected several instances of notes coming to the bank in Lynn, in which the defendant was interested; that he had frequently met the defendant at the bank, paying notes and transacting business there; whether as indorser or not, the witness could not say, but he frequently took up notes there.

The defendant consented to a default, the case to stand as if the jury had given a verdict for the plaintiff; and if upon the evidence such a verdict could be sustained, judgment was

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to be rendered for the plaintiff on the default; otherwise the plaintiff was to become nonsuit.

Stickney, for the defendant.

Choate and Proctor, for the plaintiff.

Nov 15th.

SHAW C. J. delivered the opinion of the Court. In assumpsit against the defendant as the indorser of a promissory note, two issues were tried, the one the general issue, the other upon the statute of limitations. To support the latter, a new promise within six years, was relied upon. The proof being clear, that the defendant admitted that he indorsed the note, and promised to pay it, if the holder could prove that he the defendant was legally notified of the non-payment by the promisor, a fact which the plaintiff must prove, in order to charge the defendant at all as indorser, the same proof which will warrant a judgment against the defendant, on the general issue, will take the case out of the statute of limitations.

The question then upon both grounds is, whether the evidence detailed in the report is competent and sufficient to prove a demand on the promisor and notice to the indorser.

In the first place, we are of opinion, though the testimony is not very full upon that subject, that where the parties to a note were inhabitants of Lynn, as the promisor and indorser both were, the Lynn Mechanics Bank were accustomed to give notice to the promisor to pay at the bank, instead of sending the note to him; and that the promisor and indorser on this note were so far conversant of the custom of the bank, by transacting business there, that their assent to it may be presumed.

The case then depends upon the common question, whether the plaintiff, who has the burden of proof, has offered that evidence, which is competent and sufficient to prove a demand on the promisor, and notice of non-payment to the indorser.

The witness, who was an officer of the bank, testifies to an entry made by himself, in a book kept at the bank for that purpose, certifying that on the day the note fell due he notified William B. Breed, the drawer, and Caleb Wiley the indorser, of a note corresponding in description with the note in controversy, and the identity of which is not contested. He states that he was at that time clerk in the bank, that it was his prac-

tice to carry notices personally to the residence or place of business of all persons in town, and he has no doubt that the notices were so given in the present instance. He further says, that he was careful to give the notices and to make a record of the same. In the cross-examination he states, that he has no particular recollection of the transaction, independently of the entry which he finds in the book, but from his habit of transacting business, his mode of keeping the book, and making entries therein, and the purpose of making them, he has no doubt, that the notices were left.

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It is very obvious to remark, that if such evidence is not sufficient, it would be extremely difficult to prove such acts done. Where bank messengers, notaries and such official persons, do hundreds and thousands of such acts every year, it would be contrary to all human experience, to believe that they could recall the recollection of each, by force of present memory, even after looking at a written memorandum; but the witness may testify to other facts, which, with the aid of the memorandum, will afford a very satisfactory inference that the act was done; such as his usual practice and habit, his caution never to make such memoranda unless the acts were done, and his consciousness of the importance and necessity of accuracy, in this particular. In this respect, it is like the testimony of an attesting witness to an instrument. He recognizes his handwriting, he knows he put his hand there, he testifies that he believes he would not have put it there if he had not seen the instrument executed, but he has no present recollection of the fact, other than that derived from the recognition of his handwriting. Such evidence, we think, it is every day's practice to admit, and if not controlled by other evidence, a jury might and ought to infer from it, the fact of execution.

In the first place, we think the book produced in the present case, containing the entry made by the witness, which enables him to testify, is not to be treated as a mere private memorandum, used to excite and to stimulate his memory, and enable him, after seeing it, to recall the actual present recollection of the fact to be proved. We understand it, from the manner in which the witness describes it, as a regular book kept by the bank, for the purpose of inserting therein, certificates or state-

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ments of the acts of the officers, done by them in the regular discharge of their official functions, and intended to preserve the evidence of such facts. The witness speaks of the book, as one of the "records" of the bank, and his entry therein, of the certificate of the act done, as making a "record" of the same. And in the case of the note in question, the certificate is further authenticated by the signature of the witness.

It is very clear that this is such a book, as would of itself, be evidence of the fact, if the witness were dead; *Welsh v. Barrett*, 15 Mass. R. 380; or had absconded, having committed an offence which, if he were convicted of it, would disqualify him. *North Bank v. Abbot*, 13 Pick. 465. It is not a mere memorandum, which can be used only to stimulate the faculty of memory in the witness, and then must be laid aside; it is to some extent, and for some purposes, evidence, and it is so treated in the cases cited.

Such books are in the nature of registers, and other memoranda of notaries public, which are given in evidence in connexion with testimony as to their usages and practice, whilst living, (*Miller v. Hackley*, 5 Johns. R. 375,) and may be offered in evidence after their decease, authenticated by the testimony of clerks or others, who can identify them and testify to their mode of transacting business and keeping registers of their acts. *Halliday v. Martinet*, 20 Johns. R. 168; *Nichols v. Webb*, 8 Wheat. 337. Indeed, in regard to promissory notes and inland bills of exchange, in which the protest of a notary public is not of itself necessary or even competent evidence, as by the custom of merchants it is in regard to foreign bills, the protests of notaries public stand on precisely the same footing. They are formal certificates of the acts of the notaries, authenticated by their signatures and seals, but which are not legal evidence. But if the notary, with the aid of this formal evidence of an act done by himself, can testify that he believes the act was done, though he has no present recollection of it, it is competent evidence. *Union Bank v. Hyde*, 6 Wheat. 572. Were it otherwise, inasmuch as a formal protest would be no evidence, if the notary were living, the evidence could only be perpetuated by a deposition *in per*

petuum, and even that is not usually allowable as evidence in communities and courts governed by the common law, but depends on a statute regulation of our own State.

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We think the cases where a witness has been prohibited from testifying by the aid of a memorandum, unless after looking at the memorandum he can testify from present recollection, are those where the memorandum used is not one taken by himself, or is a copy or extract of one not produced. In all such cases he is required to produce the original memorandum. *Doe v. Perkins*, 3 T. R. 749. The reason of this is obvious. Where the witness can testify to the facts, only by the aid of the memorandum which he finds, he shall produce the memorandum, because it is, under the circumstances, the best evidence which the case will afford, and better than copies or extracts, which, in reference to such originals, are secondary, and pre-suppose a better in existence, and because the production of the paper will enable the adverse party, on cross-examination, to examine the book or paper itself, so that if the matter testified by the witness, is controlled or qualified by any thing else contained in the memorandum, the adverse party may have the benefit of it.

In a case in South Carolina, the court has gone somewhat further than we find it necessary to go in the present, and have decided, that where a witness made any memorandum at the time, for the purpose of enabling him to testify to it afterwards, and can afterwards say that he made it at the time, for that purpose, and intended to make it conformably to the truth, and now believes that he did, it is competent evidence to go to a jury, though the witness admits that he cannot now testify to the facts, from present recollection, even after refreshing his memory by the use of the paper. Perhaps, in regard to sums and dates, and other minute particulars, where the witness recollects the general course of the transaction, such use is commonly made of a written memorandum in practice, though, perhaps, the witness does not usually declare so explicitly his want of present recollection as the witness did in that case. *State v. Rawls*, 2 Nott & M'Cord, 331. Perhaps, in many cases, as that of a tender of a precise amount in dollars and cents, the delivery of a cargo, kept in a memorandum book,

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and other similar cases, it would be impossible to prove the facts, without making such use of the memorandum. So of the words spoken in case of slander.

But it is not necessary to decide this general question in the case before us. The present is the case of a regular book kept at a bank, and the entries are the official acts of its clerks, done within the ordinary scope of their authority. In the case of the *Union Bank v. Knapp*, 3 Pick. 96, a book of the same description, on proof that the clerk who kept it had become insane, and on proof of his handwriting, was admitted as competent evidence. The book offered in the present case would become admissible, according to the cases cited, on proof of the handwriting of the clerk, in case of his death, insanity or other incapacity to testify; and we think it is not the less so when authenticated by himself.

As to the form of the notice given, the clerk exhibits a printed form in common use, and testifies to his belief that the notices in question were in the same form; which is competent, and in the opinion of the Court, sufficient evidence of the fact.

Judgment for the plaintiff on the default.

PAUL KENT *versus* JOSEPH GERRISH.

In case for the continuance of an obstruction to a private way, it was held, that a judgment in favor of the defendant, on the general issue, in a former action between the parties for the same obstruction, although admissible in evidence, was not a bar to the action.

By an agreed statement of facts, it appeared, that this was an action on the case for the continuance of an alleged obstruction of the plaintiff's way; that he had previously brought an action against the defendant for the same obstruction; that such previous action was tried on the general issue; and that the defendant recovered judgment, in November, 1837.

If the judgment in the former action was a bar to this action, the plaintiff was to become nonsuit; otherwise, this action was to go to trial.

Nov. 24. *Saltonstall and Choate*, for the plaintiff, to the point, that

the former judgment, although admissible in evidence, was not conclusive, cited *Standish v. Parker*, 2 Pick. (2d ed.) 20, and note; S. C. 3 Pick. 288; *Outram v. Morewood*, 3 East, 364.

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Gerrish and Lord, for the defendant, cited *Parker v. Thompson*, 3 Pick. 429; *Stafford v. Clark*, 2 Bingh. 377; *Heming v. Wilton*, 5 Car. & Payne, 54; *Buffum v. Tilton*, 17 Pick. 510; 1 Stark. on Evid. (5th Am. ed.) 221, 222, 223; *Bradford v. Bradford*, 5 Connect. R. 127; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Strutt v. Bovingdon*, 5 Esp. 59; *Johnson v. Long*, 1 Salk. 10; Com. Dig. *Action*, K 3; *Ferrer's case*, 6 Co. R. 7.

WILDE J. drew up the opinion of the Court. This was an action for the continuance of an obstruction to the plaintiff's way, he having brought a former action against the defendant for the same obstruction in which he failed to recover. The defendant relies on the judgment in that case as a bar to this action. If the defendant had justified in the former action, and issue had been joined on his right to erect the obstruction, and had been found in his favor, the judgment would have been a bar to this action, according to the doctrine laid down in *Outram v. Morewood*, 3 East, 346. But the trial in the former action was on the general issue, and the judgment is evidence in this case, but is not conclusive. This was decided in the case of *Standish v. Parker*, 2 Pick. 20, and 3 Pick. 288, after a full examination of the authorities, and we perceive no reason for questioning the authority or correctness of that decision. The case, therefore, is to stand for trial, according to the agreement of the parties

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**CHARLES BANCROFT *et al.* versus The Inhabitants
of LYNNFIELD.**

A town is authorized to indemnify its officers, against any liability which they may incur in the *bona fide* discharge of their duties, although it turn out that they have exceeded their legal rights and authority.

Where a drain was dug by a surveyor of highways, for the purpose of raising a legal question as to the bounds of a highway, and the town appointed a committee to defend an action brought against the surveyor therefor, and voted to defray the expenses incurred by the committee, it was *held*, that the town was bound by such vote, although it were under no previous obligation to indemnify the surveyor, and that the committee were entitled to compensation and indemnity from the town, for their services and expenses.

ASSUMPSIT for services and disbursements. Trial before *Shaw C. J.*

It appeared, that in the autumn of 1832, or the spring of 1833, John Upton junior, who was chosen a surveyor of highways by the town of Lynnfield, caused a ditch to be dug near one of the highways in his district ; but whether this was done by him under a belief, that it was a necessary improvement, or for the purpose of drawing on a suit to test the title to an open piece of ground through which the drain was conducted, was a question in controversy between the parties.

It also appeared, that in 1833, an action was brought by John Abbot against Upton, averring his title to the land, and alleging the digging of such ditch to be a trespass ; that at a meeting of the inhabitants of Lynnfield on April 1st, 1833, it was voted to defend Upton against the action ; that the plaintiffs, being chosen a committee by the town for that purpose, employed counsel and took the necessary measures for defending the action ; that the action was tried in June, 1833, and judgment was rendered therein for Abbot ; that the damages, costs and expenses of the defence were paid by the plaintiffs ; and that at a meeting of the inhabitants of the town on the 17th of November, 1834, it was voted, that the bills of the plaintiffs for these disbursements should be paid by the town.

The defendants contended, that the town had no authority to defend an action brought by an individual against Upton as a private individual, upon a question of controverted title, although the latter was at the time an officer of the town, and

that the votes of the town in relation thereto, were unauthorized and not binding ; and that even if a town would be authorized in voting to defend a suit against a surveyor of highways, who, acting in good faith, had, in the exercise of such office, done an act which might be shown to be a trespass upon the soil of another, yet that the town had no such authority in the present case, because, as they alleged, the ditch was dug by Upton, not for the purpose of draining the road, nor in virtue of any duty or any power of his office, but solely to raise a legal question, whether the highway covered the place where the ditch was dug, and the act of digging it was a trespass ; and the defendants offered evidence to prove these facts.

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The plaintiffs objected to the admission of this evidence, on the ground that it established no legal defence, and that as the circumstances under which the drain in question was dug, were all fully known to the inhabitants before the votes in question were passed, they were precluded from now setting up this matter in defence, if it was otherwise available.

A *pro formi* opinion was thereupon expressed, that the town were bound by their votes, and that the evidence offered was inadmissible. The parties then consented to a default, subject to the opinion of the whole Court.

Saltonstall and Choate, for the defendants, cited *Parsons v. Goshen*, 11 Pick. 396 ; *Stetson v. Kempton*, 13 Mass. R. 272 ; *Willard v. Newburyport*, 12 Pick. 227 ; *Greene v. First Parish in Malden*, 10 Pick. 500.

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Skillaber and Huntington, for the plaintiffs, cited *Willard v. Newburyport*, 12 Pick. 227 ; *Stetson v. Kempton*, 13 Mass. R. 278 ; *St. 1785, c. 75, § 7* ; *Nelson v. Milford*, 7 Pick. 18 ; 6 Petersd. Abr. *Corporations*, (Am. ed.) 637, note.

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WILDE J. delivered the opinion of the Court. The defendants admit that the services of the plaintiffs, and the expenses by them incurred, for which they demand payment, were performed and incurred at the request of the town, and that their bills therefor were allowed at a legal town meeting. They nevertheless deny their legal liability to pay, on two grounds : 1. Because, as it is said, the town was not authorized by law to raise money for the payment of these services and expenses, and that the vote to pay for them was void ; and 2. That the consideration was illegal.

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Neither of these grounds of defence can, as we think, be successfully maintained.

It is undoubtedly true, as was decided in *Stetson v. Kempton*, 13 Mass. R. 272, that towns have not an unlimited authority, in their corporate capacity, to raise money and to cause it to be assessed upon the polls and estates of the inhabitants. Such an authority would be dangerous, and it has been limited by the statute of 18785, to the cases of providing for the poor, for schools, for the support of public worship, and other necessary charges. It may be that towns are not authorized to make any contract for the payment of money, which they are not authorized to raise money to discharge by a tax on the inhabitants. This question, however, was left undecided in the case of *Stetson v. Kempton*; nor is it necessary to decide it now, as we are of opinion, that the town is authorized to raise money by a tax for the payment of these charges.

It is the duty of a town to repair all highways within its bounds, at the expense of the inhabitants, so that the same may be safe and convenient for travellers; and we think it has the power, as incident to this duty, to indemnify a surveyor or other agent against any charge or liability he may incur in the *bona fide* discharge of this duty, although it may turn out on investigation, that he mistook his legal rights and authority. The act by which the surveyor incurred a liability, was the digging a ditch, as a drain for the security of the highway; and if it was done for the purpose of raising a legal question as to the bounds of the highway, as the defendants offered to prove at the trial, the town had nevertheless a right to adopt the act, for they were interested in the subject, being bound to keep the highway in repair. They had, therefore, the right to determine whether they would defend the surveyor or not; and having determined that question, and appointed the plaintiff a committee to carry on the defence, they cannot now be allowed to deny their liability, after the committee have paid the charges incurred under the authority of the town. The town had a right to act on the subject matter, which was within their jurisdiction, and their votes are binding and create a legal obligation, although they were under no previous obligation to indemnify the surveyor. That towns have an authority to defend

and indemnify their agents, who may incur a liability, by an inadvertent error, or in the performance of their duties imposed on them by law, is fully maintained by the case of *Nelson v. Milford*, 7 Pick. 18.

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That case also is decisive as to the other ground of defence, in relation to the consideration. In that case it was decided, that a promise to refund money paid by assessors on an illegal assessment of a town tax made by them, was a valid contract ; and, in the present case, the plaintiffs' only claim is for services rendered and money paid for the town at their request. No illegal act is imputed to the plaintiffs ; and, when they were appointed a committee, they had no knowledge that any error had been committed by the surveyor. They have acted in good faith, and are clearly entitled to be compensated and reimbursed for their services and expenses.

Motion to take off the default overruled.

MARY KENT *versus* STEPHEN KENT.

Where, after land owned in common had been divided by commissioners, one of the tenants entered on that portion thereof which had been assigned to the other, and cut down and carried away a tree, it was held, that evidence of a parol license from such other tenant, granted previously on making a parol partition and renewed at the time when the commissioners were dividing the land, was admissible to show that the act was done with his consent, although it was incompetent to control the effect of this last partition.

The provision in the statute of frauds, that no action shall be maintained on any agreement that is not to be performed within one year from the making thereof, unless the same be in writing, does not extend to an agreement that one party may cut certain trees on the land of the other at any time within ten years, for such an agreement may be performed within one year.

DEBT upon St. 1817, c. 73, for entering the close of the plaintiff, and cutting down and carrying away an oak tree of the value of \$ 30, whereby the defendant was alleged to have incurred a penalty of five times the value of the tree. The defendant relied upon a license from the plaintiff as a defence.

At the trial, before Shaw C. J., it appeared, that, prior to 1834, the plaintiff was tenant in common with the defendant of a lot of land including the close, the defendant claiming in right of his wife ; that in November 1834, a partition was duly

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made and confirmed by this Court, by which the close was assigned to the plaintiff in severalty, without any exception or reservation ; that the defendant and Jacob Kent, the deceased husband of the plaintiff, holding in the right of his wife, had previously, for their own convenience, made a parol partition of the land and of the trees growing therein ; and that the trees which were to belong to the defendant were then marked, it being agreed that he should cut and take them away for his own use, as he pleased, and that those which remained unmarked should belong to Jacob.

In order to establish the license contended for, the defendant offered evidence to show, that when the commissioners were proceeding to make partition, it was agreed by the parties, that they should be requested not to take into consideration the value of the trees growing on the lot, but that the former parol agreement in relation thereto should be carried into effect, and that either party should have liberty to enter and take away the trees assigned to such party by the former agreement, at any time within ten years. This evidence was admitted *de bene esse*, the question of its admissibility being reserved.

The commissioners, being called as witnesses, testified, that in making the partition they acted upon the faith of this agreement, and did not take the trees into account in making their estimate of the value of the purparties.

No evidence was offered to show, that the plaintiff had ever forbidden the defendant to cut the marked trees, or had revoked her license, if any was ever given. The tree in question was one of those marked as belonging to the defendant.

It was insisted on the part of the plaintiff, that the evidence of the parol agreement was inadmissible, it being offered to control and vary the partition, which was matter of record ; and that such agreement did not amount in law to a license, under which the defendant could justify.

The defendant contended, that such agreement legally operated as a license for ten years ; but that if it was not available as such, it was a good license till it was revoked ; and that as no revocation had taken place when the supposed trespass was done, it was a good justification of that act and a defence to this action.

By consent the case was left to the jury, upon the evidence, to find the value of the tree ; and they returned a verdict for the plaintiff, assessing the value at the sum of \$ 18.

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If the Court should be of opinion, that the plaintiff was entitled to recover, judgment was to be entered for her, upon the verdict ; otherwise the verdict was to be amended, so as to stand as a general verdict for the defendant.

Saltonstall and *Marston*, for the defendant, to the point, that the evidence of the parol agreement was admissible, cited *Stark. on Evid.* 1049, 1050, and notes.

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Gerrish, for the plaintiff, to the point, that if the parol agreement was equivalent to a license, it was revoked by the partition made by the commissioners, cited *Pond v. Pond*, 14 Mass. R. 403.

WILDE J. afterward drew up the opinion of the Court. It was insisted on the part of the plaintiff, that evidence of a parol license, to control the effect of the partition, was inadmissible, and undoubtedly if it had been offered for that purpose it would have been ; but it was offered for no such purpose, nor could it have any such effect. It was offered merely to show, that the defendant entered, and did the act complained of, with the plaintiff's consent, and therefore was no trespasser. That a parol license is sufficient for this, can admit of no doubt.

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In the next place the plaintiff's counsel contend, that the parol license was revoked by the partition. This might have been so had not the license been renewed at the time of the partition. But as it was renewed in reference to the partition, and was to take effect after its completion, this implied revocation is clearly rebutted.

The only remaining question is, whether the parol agreement is void by the statute of frauds ; and we are clearly of opinion that it is not. By the first section of the statute of 1789, c. 16, it is enacted, that no action shall be maintained on any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This branch of the statute extends only to such agreements as are not to be

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performed within a year and expressly and specifically so stipulated ; and not to agreements which may be performed within a year, although not performed until afterwards. 1 Com. Contr. 86 ; 1 Salk. 280 ; 3 Burr. 1278 ; Skin. 353. In this case the trees might have been taken away within the year, although in fact they were not. Whether the license was or was not revocable, is a question upon which we give no opinion, as there was no proof of any revocation.

The verdict, according to the agreement of the parties, is to be altered and amended, so as to stand as a general verdict for the defendant.

Judgment for the defendant.

ROBERT B. ANDERSON *versus* DANIEL FULLER *et al*

By a contract between W. and the owners of a blacksmith's shop, it was agreed, that W. should take charge of the shop and exercise his trade as a blacksmith and agent, that he should have the profits of his labor, to be appropriated in payment for the shop and for the stock that should be furnished, R., one of the defendants, being appointed by them agent to purchase the necessary stock, and that, whenever W. should have paid a certain sum for the shop and the cost of the stock, they would convey the shop to him ; and W. agreed, that he would deliver to R. a monthly account of the work done, that the books should be kept in the name of the defendants, and that R. should collect the bills, allowing W. what should be necessary for himself and family. It was held, that the defendants were not liable for the work performed in the shop by the plaintiff, on the application of W., there being no evidence that the plaintiff was hired on the credit of the defendants.

THIS was an action for work and labor done and performed. The parties stated a case.

On the 31st of December, 1833, the defendants entered into an agreement with G. W. Winslow, in the following words ;

" This is to certify, that whereas we, the subscribers, with the hereafter named Daniel Richardson, have purchased of Timothy Saunders, a blacksmith's shop and tools in Middleton, and George Washington Winslow agrees to take the charge of said shop, and exercise his said trade as blacksmith and agent, said Washington Winslow is to have the profits of his labor, to be appropriated to the payment of said shop and tools

and the stock that shall be furnished ; and whenever said Winslow shall pay 165 dollars, with interest, for the shop and tools, and the cost of all stock that shall be furnished him, then we agree to convey him the said shop and tools, by his paying all expenses that shall arise for our trouble, and the charges that shall arise by Daniel Richardson being agent to purchase stock. And we hereby appoint Daniel Richardson agent to purchase all necessary stock for said shop, by his keeping a book of the cost of stock and the work done in the shop.” “ And I, Washington Winslow, on my part, hereby certify, that I consent and agree to the above contract and agreement made and signed aforesaid, so far as respects my agency as blacksmith, and that I will keep an account of all work done in the shop and deliver the said Daniel Richardson an account monthly, and that he may have access to the books, at any and all times, and that the books shall be kept in the name of said company ; and said Richardson is hereby authorized to collect all bills for work done in the shop and cash received by said Richardson, allowing me what shall be necessary for me and my family’s support ; provided always, reserving the stock and tools with interest and expenses.” “ N. B. It is to be remembered, that what money is subscribed and paid, is to be for the benefit of said Winslow ; and said Richardson is authorized to collect and appropriate the same for that purpose.”

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It appeared, that Winslow carried on the business of a blacksmith in the shop, under this agreement, stock being furnished by Richardson in behalf of the defendants ; that the plaintiff worked at the shop with Winslow, and on his application ; and that, subsequently, the defendants, having dissolved their connexion with Winslow and resumed possession of the shop and stock, took the books, and collected the bills.

If the Court should be of opinion that the plaintiff was entitled to recover, the defendants were to be defaulted ; otherwise the plaintiff was to be nonsuited.

Saltonstall, for the plaintiff, cited 2 Kent’s Comm. 493 ; *Adm 102*
Upton v. Gray, 2 Greenleaf, 373.

Ward, for the defendants, cited *Paterson v. Gandasequi*, 15 East, 66.

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WILDE J. delivered the opinion of the Court. As the plaintiff's services, for which he demands compensation, were rendered on the application of Winslow, he must be considered as the contracting party, and alone liable to pay, unless he contracted as the agent for the defendants, and was authorized by them so to contract ; and we are of opinion, considering the contract on which the question depends, that he was not so authorized.

The contract between Winslow and the defendants was a contract of sale of a shop and tools, of which he was to have a conveyance whenever the profits of his labor, which were to be received by the defendants, who were to furnish stock, should amount to the sum of \$ 165 and interest. It is true, that Winslow contracted to work for the defendants as their agent ; but this part of the agreement is to be understood in a restricted sense, which appears manifest from the other parts of the agreement. He was to have all the profits of his labor ; and he was in no sense their agent, except that he was to work their stock, and they were to receive the profits of his labor towards payment of the shop and tools, deducting only the amount necessary for the support of himself and family. In no part of the contract is he authorized, expressly or impliedly, to hire laborers on the defendants' account ; and there is no evidence to show that the plaintiff was hired on the defendants' credit. We think, therefore, there is no ground upon which the defendants can be held liable in this action.

Judgment for defendants.

SUPPLEMENT.

After any general assessment of a tax has been made by the assessors of a town, and committed to the proper officer for collection, and before another tax is committed to the assessors to assess, they have no authority to assess a poll or other tax, on any person, for the purpose of enabling him to vote at an election ; nor is any person, on the payment of a tax so assessed upon him, qualified to vote, according to the third article of amendments of the constitution.

THE justices of the Supreme Judicial Court, in answer to the question proposed to them by the order of the Hon. House of Representatives, respectfully submit the following opinion.

The question is as follows : — “ After the annual assessment of taxes has been made by the assessors of any town, and committed for collection, can said assessors assess a poll or other tax, on any person, otherwise qualified, for the purpose of enabling him to vote at any election ? And is such person, on the payment of the tax so assessed, qualified to vote at elections, according to the provisions of the third article of the amendments to the constitution ? ”

This question depends upon the construction of the third article of the amendments of the constitution, providing for the qualifications of voters ; which, among other things, vests that right in every male citizen, otherwise qualified, who shall have paid, by himself or his parent, master or guardian, any state or county tax, which shall, within two years next preceding the election in question, have been assessed upon him in any town or district in this Commonwealth.

The question seems to proceed on the assumption, that there can be but one state or county tax in each year, which it designates as the annual tax. We are not aware, however, that there is any thing in the law to prevent the levy and assessment of more than one tax in the year, or any thing that distinguishes a tax as the annual tax. But it has become so common, if not universal, in practice, to levy a tax on the first of May, that it may be properly enough called the annual tax ;

but there being nothing in the article in question to distinguish one tax from another, and as it speaks of any tax assessed within two years preceding, we presume the question is intended to apply to any general tax assessed upon the inhabitants in the course of the year.

The question then will be, whether after such general assessment of a tax has been made, and committed by the assessors to the proper officer for collection, they can assess a poll or other tax on any person, otherwise qualified, for the purpose of enabling him to vote at any election ; and whether such person, upon the payment of the tax so assessed, is qualified to vote.

We are of opinion, that the assessors have no legal authority to assess any tax, under the circumstances named ; nor does any person, by the payment of the tax so assessed, thereby become qualified to vote, under the provisions of the article in question.

To prevent misapprehension, it may be proper to state the grounds of this opinion, and to limit it to the cases to which we think it applicable.

The powers of assessors are prescribed, regulated and limited by statute. By *St. 1785, c. 50, § 1*, assessors are to be appointed in each town, who are to be assessors of all such rates and taxes, as the general court shall order and appoint each town to pay, within the space of one year from their choice. It further provides, that they shall be assessors of county, town and district taxes. They shall assess the polls and estates within their respective towns, their due proportion of any tax, according to the rules set down in the act for raising the same ; they are to make perfect lists thereof, under their hands and seals, and to commit the same to a collector, with a warrant, under their hands and seals ; they are to return a certificate thereof to the treasurer and receiver-general of the Commonwealth, with the name of the collector ; and they shall also have their assessment recorded in the town book, or leave an exact copy thereof with the town clerk, or file the same in the assessors' office, where one is kept, before the same is committed for collection ; and they shall also lodge in the clerk's office, the invoice or valuation, or a copy thereof,

from which the rates or assessments are made, that the inhabitants, or others rated, may inspect the same. Their duty, in the 4th section, is declared to be that of assessing or apportioning any rate or tax upon the inhabitants or estates, &c.

Some of these regulations seem particularly appropriate to state taxes ; but the same statute, § 8, provides that all county, town, and other rates and taxes, shall be assessed and apportioned by the assessors, upon the polls and estates, according to the rules which shall from time to time be prescribed and set in and by the then last tax act ; and the assessors shall cause attested copies of such assessments and valuations to be lodged in the clerk's office, or filed in their own, if they have one. Section 11th authorizes assessors to apportion on the polls and estates, according to law, such additional sum, over and above the precise sum committed to them to assess, as any fractional divisions of such precise sum may render convenient, not exceeding five per cent., and in no case to exceed forty pounds.

Without pursuing the legal provisions, respecting the authority and duty of assessors further, it is manifest from this general view, that the office and power of assessors are special and limited, and that whenever a tax is duly levied by the constituted authorities of the State, county or town, it is their duty to assess and apportion the whole sum, by one act, upon all the polls and estates liable to contribute thereto, ratably and proportionably ; and they are armed with powers, which the law deems adequate to the purpose, to ascertain who are liable, and in what proportion, thus to be assessed and rated. Before this apportionment can be made, they must necessarily have before them the valuation, embracing all the polls and all the estates thus liable to be assessed. Without this no regular apportionment can be made.

When the apportionment is thus made, the assessment list, or tax bill, together with the valuation, having been placed in a public office for general public inspection, and having been certified to the town clerk, and warrant committed to the collector, to collect such rates and taxes, the authority and powers of the assessors are wholly exhausted ; and should they afterwards place the names of other persons on such lists, or

on their tax books, the act would be wholly void ; and in no legal sense could it be said, that any tax was thereby assessed upon such persons ; nor can the payment of any such sum, thus placed on the tax list, after it is thus closed and committed for collection or placed on the assessors' books, be considered as the payment of a tax assessed.

In expressing this opinion, we beg leave not to be understood as intending to suggest, that to qualify one to vote, within the provision of the constitution, it must appear that the tax which he has paid is in all respects a legal tax, or that it is competent to go behind the actual payment of a tax, to inquire whether there has or has not been any irregularity or illegality in the levying or assessment of the taxes. This is a point which the person claiming the right to vote is not bound to inquire into, and in most cases cannot know. It is sufficient that he has paid a tax *de facto* levied and assessed upon him. This distinction we think is manifest. In the one case, the tax is an actual tax, although it may be informal, irregular, and even illegal, and of which, perhaps, he might avoid the payment, should he elect to contest it ; in the other, it is the mere semblance of a tax, purporting to be assessed by persons wholly unauthorized, and thus is a proceeding utterly void, from which no right can be derived.

Upon these grounds we are, therefore, of opinion, as already substantially expressed, that after the assessment of a general tax, and the same is committed for collection, and before another tax is committed to the assessors to assess, they have no authority to assess a poll or other tax, upon any person, by the entry of such person's name on the assessors' books, the tax list, or otherwise ; that such assessment is wholly void ; and that such person, by the payment of such void tax, does not thereby become qualified to vote, according to the provisions of the third article of the amendments of the constitution.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
MARCUS MORTON.

March 31st, 1836.

INDEX.

ACCOUNT.

1. Before the action of account was abolished by the Revised Stat. c. 118, § 43, such an action was maintainable by a goldsmith and retailer of wares appertaining to that trade, against his former partner in the same business, who, after the dissolution of the partnership, became the receiver of moneys coming to their common profit, to render an account when requested. *Foote v. Kirkland.* 299
2. *Held*, also, that where an action of account was commenced before that form of action was abolished by the Revised Statutes, it might be prosecuted to final judgment after they had gone into operation, the rights which the plaintiff acquired upon the commencement of the action being saved by the Revised Stat. c. 146, § 5. *Ibid.*

ACTION.

1. Where in an action brought by two they fail to prove that they are jointly interested in the subject matter of the action, the court may allow the name of the one who is not interested therein, to be struck out. *Wisor v. Lombard.* 57
2. The statutes of 1797, c. 50, and 1828, c. 114, requiring the continuance of an action brought against

a person out of the State, does not extend to actions commenced before a justice of the peace. *Gay v. Richardson.* 417

3. Before the Revised Statutes went into operation, if there were two counts in the declaration on distinct causes of action, and the jury returned a verdict for the plaintiff on the first count, but disagreed as to the second, it was competent for the court, before the verdict was affirmed, to permit the plaintiff to discontinue as to the second count; and judgment might then be rendered upon the verdict on the first count. *Hall v. Briggs.* 503

See RELEASE, 4.

ACTION ON THE CASE.

- In the absence of all rights acquired by grant or adverse user for twenty years, the owner of land may dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbour's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbour of water. *Greenleaf v. Francis.* 117

APPEAL

1. A petition to a judge of probate to allow an appeal from his decree, and a formal decree granting sur¹

petition, are not usual in practice, nor requisite to the validity of an appeal. *Boynston v. Dyer.* 1

2. On an appeal from a Court of Probate, the appellant is restricted to the points specified in his reasons of appeal, but not to the same arguments, views or evidence which were presented before the Court of Probate. *Ibid.*

See DEVISE, &c., 15.
ERROR, 2.

ASSIGNMENT.

- 1 Where an assignment was made by an insolvent debtor to a creditor, in trust for the benefit of the assignee and such other creditors as should execute the same within a certain time, and the assignee accepted the trust, and a portion of the creditors became parties to the assignment, it was *held*, that those creditors who had executed the assignment, were not authorized to annul it and attach the property, before the expiration of such time, without the consent of the other creditors, although the debtor had withheld the evidences of debts due to him, and had refused to deliver to the assignee, and fraudulently wasted, a part of the property assigned; that the assignee was bound to allow all the creditors to become parties to the indenture, within the time limited; that a creditor whom the assignee had, within such time, refused to permit to execute the assignment, might enforce the execution of the trust or recover an equitable compensation; and that the assignee was bound to account, not only for the property which he had received, but for such as might have been recovered by him from the debtor by the use of due diligence. *Pingree v. Comstock.* 46

An assignment by an insolvent debtor of "all his lands, tenements and hereditaments," was *held* sufficient to pass all his real estate,

without a more particular description. *Ibid.*

3. The *lay* or share in the profits of the voyage, which a seaman in a whaling ship receives, according to a custom, in lieu of wages, is assignable before the commencement of such voyage. *Gardner v. Hoeg and Trs.* 168

4. Where a seaman, in a whaling ship, by his deed purporting to be for the consideration of \$800, assigned his *lay* before the commencement of the voyage, but the assignee paid him no money at the time, but agreed to advance money for his use before and during the voyage, and made advances accordingly, and upon the assignor's return rendered him an account thereof, in which he was credited with the sum of \$800 for his *lay*, with which account he was satisfied, it was *held*, that such assignment was valid as against the plaintiff, a creditor of such seaman at the time of the assignment, although no notice of the assignment had been given to the owners of the vessel, until after the termination of the voyage, and just before such *lay* was attached in their hands by the plaintiff. *Ibid.*

5. Where an insolvent debtor in Connecticut assigned all his property, including certain land in Massachusetts, in trust for the benefit of his creditors, *pro rata*, under the provisions of a statute of that State, none of the creditors being parties to the assignment, and at the same time conveyed such land to the trustee by a deed which referred to the assignment as to the purposes of the conveyance, and which was duly executed and recorded according to the laws of Massachusetts, it was *held*, that the statutory assignment in Connecticut was void, in regard to land in Massachusetts, the title to real estate being exclusively subject to the laws of the State where it lies; and that the

second deed, being ancillary to the statutory assignment, was without consideration and void as against creditors in Massachusetts, who attached the land after such deed had been recorded. *Osborn v. Adams*. 245

3. One summoned under the trustee process, disclosed in his answers, that the principal defendant made a general assignment of his property to the respondent in trust to pay creditors who should become parties to the assignment, and that the assignment was executed by the defendant, the respondent, and a few preferred creditors; that afterwards these creditors, together with some others, including the plaintiff, who had attached the property in the respondent's hands, gave the defendant a letter of license, containing a stipulation that the creditors would accept the principal of their demands in full satisfaction, on condition that it should be paid in ten equal semi-annual instalments, and a further stipulation, that the creditors who had attached the property in the respondent's hands should be at liberty to continue their actions in court until default should be made in the payment of the instalments; that it was then expected and represented by the defendant, that by having the use of certain machinery and tools embraced in the assignment, he would be able to pay all his creditors; that under this expectation the respondent permitted the defendant to possess and use such machinery and tools, not however relinquishing the respondent's right to sell the same, should it become necessary; that the defendant, after paying half of the instalments, became unable to pay the rest, and thereupon the respondent proceeded to sell the property for the payment of the debts; that none of the creditors, prior to the failure to pay the instal-

ments, had requested the respondent to hasten the sale, and he believed that they acquiesced in the postponement of it; and that he sold some of the property to one W. on a credit, taking therefor his negotiable note, payable to a bank and signed by the respondent himself as surety and discounted by the bank. It was *held*, that the respondent should account for the price of the property sold to W., the note taken being *primâ facie* a payment, and this presumption not being rebutted by the fact that the note was signed by the respondent as surety. *Scott v. Ray and Trs.* 360

7. *Held* also, that under the circumstances above stated, the permission given to the defendant to possess and use the machinery and tools, was not sufficient to prove the assignment fraudulent and void.

Ibid.

8. *Held* also, that the respondent was not to be charged with rent, hire or use of the machinery and tools, it being no part of the trust that he should let or use the same for profit, and he having received nothing by way of rent or use, and there being, by reason of the license, to which the plaintiff was a party, no negligence on the part of the respondent, in delaying to sell the property. *Ibid.*

9. *Held* also, that in stating the demands which were to be allowed as a charge on the funds, the respondent should be permitted to cast interest on his own demand and those of other creditors, parties to the assignment, up to the time of selling the property and realizing the proceeds. *Ibid.*

10. The respondent having a demand due to him personally, and another due to him as assignee, against the same person, and having obtained satisfaction of the first demand, it was *held*, that he should apply the satisfaction received, to both de-

- mands, *pari passu*, it being his duty to take as good care of the trust property as of his own. *Ibid.*
11. The respondent having answered that he had funds in his hands, and that he had paid a co-assignee a certain sum for his services, and that he thought this sum had not been repaid him by the defendant, he was *held* to be chargeable for such sum, the burden being upon him to show that it had not been refunded. *Ibid.*
12. An assignment by an insolvent debtor, of a part of his property, in trust for the benefit of his creditors, provided for the payment, first of certain sureties, also creditors, including the plaintiff, who was one of the assignees, in full, if the property should be sufficient, otherwise *pro rata*, and then of such other creditors as should become parties to the assignment, in full or *pro rata*; and the assignees covenanted to dispose of the property and pay over the proceeds in manner aforesaid, within one year, and the "creditors" becoming parties to the assignment, agreed, "upon being paid in manner aforesaid, to cancel and discharge their respective demands." It was *held*, that the execution of the indenture of assignment by the plaintiff, and his acceptance of the trust, operated as a full and immediate discharge and satisfaction of his claims, both as surety and as creditor; so that a subsequent conveyance to him by the debtor, of other property, as further security for those creditors, was without consideration and invalid against a creditor not a party to the assignment. *King v. Lyman.* 376
13. An assignment by partners, of their joint and several property, in trust for such of their joint and several creditors as should become parties thereto, is valid as against an attaching joint creditor, if the amount of the demands of the joint creditors, who had become parties before the attachment, is sufficient to absorb all the property assigned. *Read v. Baylies.* 497
- See RELEASE, 1, 2, 3*
- ASSUMPSIT.**
See CONTRACT, 6.
PARTNER, 6, 7.
- ATTACHMENT.**
1. Where the holder of two notes made by the same promisor commenced an action against him, declaring on the common counts for a sum greater than the amount of the two notes, and attached property sufficient to satisfy both, but did not intend to include in the action one of the notes, which was signed by a surety, and there were subsequent attachments of the same property by other creditors, it was *held*, that the plaintiff was not bound to comply with the request of the surety, to put into the action the note signed by the surety. *Adams Bank v. Anthony.* 238
 2. Whether by so doing the plaintiff would not commit a fraud upon the other attaching creditors which would deprive him of the benefit of his attachment, *quare.* *Ibid.*
 3. *Held* also, that an offer of indemnity for so doing, by the surety, would not vary the obligations and duties of the plaintiff. *Ibid.*
 4. The provision in *St. 1822, c. 33*, [Revised Stat. c. 90, § 58.] authorizing the sale of goods attached on mesne process, upon the request of either of the parties to the action, is not limited to live stock and goods of a perishable nature, but extends to any chattel which is liable to depreciate greatly in value by keeping, or which cannot be kept without great and disproportionate expense. *Crocker v. Baker and Trs.* 407
 5. The certificate of the appraisers appointed under the statute, that

the goods attached are liable to depreciate, and that the keeping of them will require great expense disproportionate to their value, is conclusive evidence of these facts, in justification of a sale by the officer. *Ibid.*

6. Notice to the defendant, that the plaintiff has applied to the officer to make sale of the goods on mesne process, and that the defendant may appoint one of the appraisers, may be given by leaving a written notification at the defendant's usual place of abode. *Ibid.*

7. The giving a credit to the purchaser of the goods will not invalidate the sale; but it seems it will render the officer responsible for the price. *Ibid.*

BANK.

See CORPORATION.

EVIDENCE, 6, 7, 8.

BASTARD.

A misrecital in the condition of a bastardy bond, of the day on which the obligee made her accusation against the reputed father of the child, does not invalidate the bond. *Chapel v. Congdon.* 257

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. Where a note is payable on demand at a specified bank, no demand need be made at any other place, and in an action against an indorser, it will be presumed, in the absence of evidence to the contrary, that the note was at the bank, and that some officer of the bank was in attendance to receive payment. *Folger v. Chase.* 63

2. Where a note indorsed by the payee to a bank of which P. H. F. was the cashier, was again indorsed as follows: "P. H. F., Cashier," it was held, that such second indorsement was sufficient. And it seems,

that in an action upon such note, by the second indorsees against the payee, if the second indorsement is not sufficiently certain, the plaintiffs may, at the trial, prefix the name of the bank to such indorsement. *Ibid.*

3. An indorsement written on a slip of paper, which was attached to the back of a note by a wafer, for the purpose of writing receipts of partial payments thereon, there not being room on the back of the note, was held to be sufficient; the indorsement having been made after several of such receipts had been written on such attached paper. *Ibid.*

4. Where a joint and several promissory note was executed and left in the hands of M., one of the promisers, to be delivered to the payee, when it should be demanded by him, in exchange for a note for the same amount, but of a previous date, and signed by M. alone, and no demand was made therefor by the payee before the death of M., it was held, that the new note did not operate *de facto* as a payment of the old note, that the property in such new note had not vested in the payee, and that he could not recover the possession of it from the administrator of M., it being presumed, that the interest which had accrued upon the old note was to be paid upon making the exchange. *Canfield v. Ives.* 253

5. In the case of a note indorsed after it has become due, the indorser is not liable unless payment be demanded of the maker, and notice of the non-payment given to the indorser; and as such a note has become payable on demand, the demand on the maker must be made within a reasonable time, and immediate notice of non-payment given to the indorser. *Colt v. Barnard.* 260

6. A promissory note given for compounding a public prosecution for

a misdemeanor, is founded upon an illegal consideration. *Jones v. Rice* 440

See ASSIGNMENT, 6.
CORPORATION.
EVIDENCE, 6, 7, 8.
GUARANTY, 1, 2.
PARTNER, 9, 10.

BOND.

See BASTARD.

CANAL.

Two individuals having contracted with a canal corporation to construct the canal on the line on which it had been duly located under the act of incorporation, to find all the materials and to pay all damages for land taken for the canal, with a stipulation that, by the consent of the corporation, the line of the canal might be altered, these contractors, together with other persons, for the purpose of speculation in real estate, entered into an agreement with the demandant, by which he granted them liberty to construct the canal through his homestead, in a line deviating from the original location, in consideration whereof he was to have the right to retain his title, claiming no damages, or within a fixed period to convey to them his homestead for a certain price. A canal was made accordingly over the demandant's land, and afterwards the agreement was rescinded in order to place all the parties to it in the same situation as if it had never been made. The corporation subsequently made use of this portion of the canal, and in a writ of entry brought against them by the demandant, they pleaded a special non-tenure and disclaimer, by averring that they obtained a grant to excavate, construct and use their canal and embankments over his land, and that under such

grant they entered and excavated, &c., and acquired a right to occupy, use and improve the canal over the demanded premises, and that saving these rights they did not claim, &c. It was *held*, that the demandant's agreement with the contractors and others was no more than a personal license to those individuals, and that the plea was not sustained by the evidence. *Cobb v. Hampshire and Hampden Canal Co.* 340

CHARITY.

1. The *St. 43 Eliz. c. 4*, is in force here, at least so far as to determine what are gifts to charitable uses. *Sanderson v. White.* 328
2. In the case of gifts in trust to charitable uses, no neglect, misapplication of funds or other breach of trust by the trustees, will give a right to the heirs of the donor to call upon a court of equity to declare a resulting trust for themselves. They have, therefore, no beneficial interest accruing from the non-execution of such a trust. *Ibid.*
3. A testator gave certain property to trustees, in trust to be paid to them or their successors, whom they should name, and to be disposed of in the manner following: "the said sum shall be kept out at interest, &c. and the interest or annual income shall be applied to the pay or maintenance of a faithful, competent instructor of said school in Ashfield aforesaid; and I hereby request my said trustees to give to said institution an appropriate name, relying on the integrity and faithfulness of said trustees and their successors, to make from time to time such rules and regulations as they may believe the best adapted to insure success, always having a regard to virtuous and pious youth of genius in indigent circumstances." The trustees were sub-

sequently incorporated, the act of incorporation providing, "that all grants and donations, which had been or should be thereafter made for the purpose aforesaid, should be confirmed to the said trustees and their successors in that trust, forever, for the uses which in such instruments were or should be expressed; provided such uses should not be repugnant to the design of this act." It was *held*, that the trustees were authorized to apply for and to accept such act of incorporation, the provisions of the act being calculated to carry into effect and not to defeat the objects of the testator; and that an application to this Court to compel the trustees to execute such trust, could not be sustained by the heirs of the testator, either as cestui que trusts or as visitors. *Ibid*.

4. *It seems*, that trustees having themselves a visitatorial power, may, in case of any violation of law, be proceeded against either at law or in equity, as by *mandamus*, prohibition, information, or an action on the case. And where there are trustees in virtue of an express trust under a will, and where, therefore, they are within the equity jurisdiction of this Court, they are within its superintending power, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction of all abuses of trusts. *Ibid*

COMPOUNDING A MISDEMEANOR.

See BILL OF EXCHANGE, &c. 6.

CONSTITUTIONAL LAW.

1. A corporation is not authorized to appropriate private property to public uses, without the consent of the owner, unless it appear, either by the express words of the act of incorporation, or by necessary implication therefrom, that the legisla-

ture intended to confer such authority upon the corporation *Thacher v. Dartmouth Bridge Co.* 501

2. An act incorporating certain persons for the construction of a bridge, and conferring upon them authority to take the land necessary for such purpose, without the consent of the owner, and making no provision for his indemnification, is, in this respect, in contravention of the constitution of the Commonwealth, and is so far void. *Ibid*

See EVIDENCE, 3
VOTER.

CONSUL.

1. Under the act of Congress of 1792, c. 24, empowering consuls of the United States to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, and therewith "to pay the debts due from his estate which he shall have there contracted," a consul is not authorized to pay a claim, not reduced to a judgment, for damages for a wrongful act committed by the deceased. *Sturgis v. Slacum*. 36
2. The defendant, who was consul of the United States at Buenos Ayres, being about to visit the United States, appointed K. acting consul during his absence, but the chargé d'affaires of the United States at Buenos Ayres refused to recognize K. as such, and performed the duties of consul himself, until the appointment of K. was approved by the government of the United States; and in consequence of such refusal, K. was prevented from receiving the emoluments of that office for several months. The chargé d'affaires subsequently died intestate, and the defendant, in pursuance of the act of Congress of 1792, c. 24, took possession of his property, and, having sold it, transmitted to the plaintiff, who was appointed administrator in this State

an account of the disposition made of it, showing a balance in favor of the estate, which the defendant claimed to retain on account of the intestate's refusal to recognize K. as acting consul. It was *held*, that the defendant, by setting up such claim, ceased to act under that statute; that he had no lien on the property for the alleged tort of the intestate; and that an action at law might be maintained by the plaintiff against him, in this State, to recover such balance. *Ibid.*

CONTRACT.

1. The power of rectifying written contracts on parol proof, has not been conferred on this Court. *Leach v. Leach.* 68
2. The plaintiffs, who were the holders of a promissory note of a corporation, in which the stockholders were personally liable for its debts, agreed with the defendant, who had purchased up most of such debts, that they would accept thirty-five per cent of the amount due on the note, and deliver the note to him, but that, in case one F. should be considered chargeable with the amount of such note, by reason of his being or having been a stockholder, whatever might be obtained from F. should belong to them, the defendant not assuming to make any attempt for the recovery thereof from F. except at their request and expense, and being authorized to discharge any other member of the corporation, however it might affect the claim reserved in favor of the plaintiffs against F. At the time when this agreement was made, an action was pending, in which the liability of F. was in controversy; but before it was decided, the defendant, in consideration of a certain sum paid by F., without the knowledge of the plaintiffs, made a compromise with him of all claims against him on account of the debts of the corporation, including the note in question, and discharged him from all his supposed liability therefor, but without discharging the other members of the corporation. The plaintiffs afterwards, and when the note was barred by the statute of limitations, directed the defendant to take all necessary measures for the collection from F. of the balance due on the note, and authorized him to draw on them for the expenses thereof. It was *held*, that as the defendant had authority to discharge the other corporators, the effect of which would be to exonerate F. from liability, except perhaps for his share of the debts in proportion to the amount of his stock, if the defendant could make a compromise with F. equally favorable to the plaintiffs without discharging the other corporators, he had authority to do so and the plaintiffs were not entitled to recover of the defendant the whole sum due on the note. *Phoenix Bank v. Bumstead.* 77
3. *Held* also, that although it had never been determined that F. was legally liable, yet as he had made a voluntary payment to the defendant on account of this note, the plaintiffs were entitled to the benefit of it. *Ibid.*
4. A mortgager of real estate whose equity of redemption had been attached by a creditor, in consideration of the sum of \$1200, conveyed the land to the defendants, without his wife releasing her right of dower, and the defendants, at the same time, signed an agreement, by which, after reciting that the land had been so conveyed and mortgaged, and was subject to other claims and incumbrances, they promised the mortgager to pay him the sum of \$1200, "after he has cleared and freed said premises from all *claims and incumbrances*, or the balance, if any there shall be, after having satisfied said claims

and removed said incumbrances, ourselves." It was *held*, that the inchoate right to dower of the wife, was not a *claim* or *incumbrance* contemplated by such agreement. *Fuller v. Wright*. 403

- 5 An agreement between D. and F. recites, that D. is the owner of land which would be enhanced in value if the Boston and Worcester Rail Road Corporation should establish their depot on certain flats, and that in order to procure the corporation to make such location of the depot, it is necessary to form a joint stock company to purchase the flats and give a portion thereof to the rail road corporation for the depot, and that F. has agreed to aid in getting up such a company and in causing the rail road corporation to fix its depot on the flats, it being understood that he is of opinion that the rail road corporation, with a view to the public good and the interest of its stockholders, ought to have its depot there; and D. agrees to make F. a pecuniary compensation, so soon as the depot shall be located on the place specified. A company was accordingly formed and incorporated, with power to purchase and hold the flats and to give a portion thereof to the rail road corporation as an inducement to establish the depot thereon, and an agreement was made between the two corporations by which the depot was located on the flats. F. was a member of the rail road corporation at the time when he made the agreement with D., and subsequently became a member of the joint stock company. This agreement was known only to the parties and the subscribing witnesses, though there was no stipulation that it should be kept secret. It was *held*, that this agreement was contrary to public policy and to open, upright and fair dealing, because it tended injuriously to affect the public interest in having the

fittest location of the depot, and the interests of the two corporations, and consequently it was invalid. *Fuller v. Dame*. 472

6. By a contract between W. and the owners of a blacksmith's shop it was agreed, that W. should take charge of the shop and exercise his trade as a blacksmith and agent, that he should have the profits of his labor, to be appropriated in payment for the shop and for the stock that should be furnished, R., one of the defendants, being appointed by them agent to purchase the necessary stock, and that, whenever W. should have paid a certain sum for the shop and the cost of the stock, they would convey the shop to him; and W. agreed, that he would deliver to R. a monthly account of the work done, that the books should be kept in the name of the defendants, and that R. should collect the bills, allowing W. what should be necessary for himself and family. It was *held*, that the defendants were not liable for work performed in the shop by the plaintiff, on the application of W., there being no evidence that the plaintiff was hired on the credit of the defendants. *Anderson v. Fuller*. 572

See CANAL.

FRAUD, 1, 2, 6.

MORTGAGE, 5, 6.

PARTNER, 1, 2, 3, 6.

SALE, 5.

CONVEYANCE.

1. S. L. joined with his wife in executing a deed, with covenants of warranty on his part, which contained the following clauses: "I, S. L. and H. L., wife of S. L., (in her right as to one quarter part of the hereinafter described and granted premises,) in consideration of &c., do hereby give, grant, sell and convey unto B. all right, title and interest, which we have in and to'

- certain land ; " three undivided quarter parts of the land hereby conveyed, belong to S. L. in his own right, in fee, and the remaining fourth part belongs to S. L. and to H. L., his wife, in fee, in her right ; " " to have and to hold the afore-granted premises to B. " &c. ; " in witness whereof we, S. L. and H. L., my wife, in token of our conveyance of all right, title and interest, whether in fee or in freehold, in the premises, have hereunto set our hands, " &c. It was *held*, that the wife was barred by such deed, of her right to dower in the three undivided fourth parts of the land which belonged to her husband. [See Revised Stat. c. 60, § 7.] *Learned v. Culler.* 9
- 2 By an indenture between a father and his son, the father, in consideration of a sum of money, conveyed his farm to the son, with covenants of warranty, and the son covenanted, that he would support the father when he should be unable to support himself, that he would pay certain legacies, and that the several undertakings in the premises, by him to be performed, should be " considered as a charge and lien " on such real estate, and should " have the effect in law to charge the same real estate, as a mortgage security ; " and the father, during his lifetime, and while he was able to labor, was to have the right to occupy the farm, in the same manner as though the indenture had not existed, and his debts, if he should owe any at his decease, were to be paid out of his personal estate by his son. It was *held*, that, under such indenture, (supposing it valid,) the father had no legal estate in the farm capable of being extended upon by virtue of an execution against him, it not appearing that he had ever entered for condition broken, as upon land under mortgage, or given notice that he held for condition broken. *Gurn v Buller.* 248
3. *Held* also, that the indenture, as it purports to be made on a pecuniary consideration, and contains onerous stipulations on the part of the grantee, could not be deemed a voluntary conveyance, to be pronounced, *per se*, fraudulent against creditors as matter of law ; but that if no consideration was in fact paid, if it was a conveyance of the whole of the grantor's estate, if he was indebted at the time, and if the conveyance had a tendency to defraud and defeat or hinder the creditors, the deed was fraudulent and invalid as against creditors. *Ibid.*
4. The *St.* 1834, c. 184, § 5, provides, " that any person who shall suffer an injury to his land by " cattle, &c. " belonging to another, unless the owner thereof shall be in possession of contiguous land from which such animals shall have escaped through the neglect of the person injured to maintain his part of the division fence, " may impound, &c. " The owner of a tract of land conveyed a portion of it to the town in which it lay, by a deed containing this clause : — " and it is for the use of a burying-place ; if the above described land shall be inclosed with a fence, the same is to be done by the inhabitants aforesaid ; " and the town accepted the deed and built a division fence, but did not keep it in repair, and in consequence of this neglect the cattle of the person in the possession of the contiguous land escaped therefrom into the burying-place, and thereupon the town impounded them. It was *held*, that the town was bound to maintain the fence, and that the impounding was, therefore, unlawful. *Minor v. Deland.* 266
5. Where a grant is made of a water power, in terms, and the privilege itself is the principal subject, if it is left in doubt, whether it is a grant of a sufficient quantity of water to carry a particular kind of

mill, making reference to such mill to indicate and measure the quantity of water power intended to be conveyed, or whether it is a grant of the use of the water to carry such particular kind of mill only, the former construction is to be more favored, because, in general, it is most beneficial to the grantee without being more onerous to the grantor, and because such construction is most favorable to the general interests of the community.

Ashley v. Pease. 268

6. The plaintiff, being the owner of land on a stream of water, and of a water privilege, granted by indenture a parcel of the land, with all the buildings thereon occupied by the grantee for a fulling mill and dyeing house, and the appurtenances and privileges thereunto belonging, and covenanted, that whenever there should be a sufficiency of water to supply the mills standing on the dam, he would permit the grantee to draw from the floom "so much water as may be necessary to carry and supply the fulling mill of the grantee, which now stands or which may hereafter stand on the same spot," but that "when there is not a sufficiency of water for the purposes and uses aforesaid, then the grantee, his heirs and assigns, are to draw water from the said floom for the use of the said fulling mill or mills, twelve hours successively in the twenty-four," [or as it was expressed in the other part of the indenture, "for the uses of his or their fulling mill, as aforesaid, twelve hours," &c.] and that he would maintain fifteen sixteenth parts of the dam; and the grantee covenanted, that he would maintain the other sixteenth part of the dam, and that he would never use his fulling mill or "any other mill standing in the same place, so as in any manner or way to interfere with or obstruct the going of said saw mill of the plaintiff or any

mill which may hereafter stand in the same place, except by drawing water from said floom, as aforesaid." At the time of the execution of the indentures, the business of fulling cloth at such fulling mill had never required the use of the water for more than twenty weeks yearly. It was *held*, that this was not a grant of a water power to carry a fulling mill, to be applied by the grantee, at his pleasure, to any works requiring an equal amount of power, but that the use of such water power was restricted thereby to the purpose of working a fulling mill only. *Ibid.*

7. Land was conveyed by L. to S., and at the same time an indenture was executed by the parties, which set forth, that S. "demised, granted and to farm let" the premises to L., to have and to hold during the life of L., for the purpose, that S. should maintain L. for life; and that "the lease aforesaid is given by S. for the purpose of securing to L. the maintenance aforesaid." S. died in the lifetime of L. It was *held*, that the indenture was a mortgage; and that after the death of L. the widow of S. was entitled to dower in the land, as against a person claiming under S. *Lanfair v. Lanfair.* 299
8. D., the owner of a tract of land and two mill privileges, conveyed to M. a portion of the land, with a mill privilege, described in the deed by metes and bounds, "together with the privilege of a dam below D.'s factory and flowing the water as high as will answer and not injure or obstruct the water wheels of D. above." It was *held*, that this was a grant to M. of a right to build a dam for a mill privilege, and if, for the purpose of raising the water to the height agreed upon, it was necessary for M. to extend his dam over a part of the tract not included by such metes and bounds, he was authorized to do so,

by the grant ; that evidence of acts done by the parties under a mutual agreement, immediately after the grant was made, by way of marking out the site and height of the dam to be erected by M., was competent for the purpose of determining the extent of the grant ; and that M. might maintain trespass *quare clausum* against D. for cutting through that portion of the dam which was placed upon the land not included by the metes and bounds, the interest of M. therein being a right of possession for the purpose of the dam, so long as his mill should continue, and not a mere easement. *Dryden v. Jepherson*. 385

- 9 A deed set forth, that the grantor, in consideration of the sum of \$3000 paid by the grantee, gave, granted, sold and conveyed to him certain land, "saving and reserving to the grantor, however, the right to use, occupy and enjoy, during his natural life, free of all rent or charge whatever and all molestation in the same," the granted premises. It appeared that the grantee had married the daughter of the grantor, and that she died before the execution of the deed, leaving children who were still alive. It was *held*, that the deed did not pass a freehold to the grantee, presently, and create a new estate for life in the grantor, by way of reservation, but created a freehold estate to commence *in futuro*, and consequently, if regarded as a feoffment or bargain and sale, was void ; but that it was a good covenant to stand seised to uses, the consanguinity between the grantor and his grandchildren being a sufficient consideration therefor, and it being competent to aver and prove such consideration, although a different one was set forth in the deed, and no allusion was made therein to such consanguinity ; and consequently that

the deed vested the estate in the grantee, subject to the life estate of the grantor. *Gale v. Coburn*. 397

10. The owner of land first mortgaged it to the tenant and then conveyed it by deed of warranty to R., taking back a mortgage to secure the purchase money ; and R. conveyed it to the demandant. The deed to R. was recorded before the mortgage to the tenant, but after R.'s mortgage to the original owner. The mortgage from R. was not released or discharged, although the debt secured by it was said to have been paid, but after condition broken. The original owner and the tenant then conveyed the land to S., who reconveyed it to the tenant. It was *held*, that whether R.'s mortgage had or had not been paid, the *legal* title had passed by it to the original owner and remained in him, and that by the conveyances from him and the tenant to S. and from S. back to the tenant, it became vested in the tenant, and therefore a writ of entry by the demandant against the tenant could not be sustained. *Sherman v. Abbot*. 448

11. A grantor conveyed all his farm in S. bounded, &c., also six acres of woodland, described by bounds, "being the same farm whereof M. died seised, and which the heirs of M. conveyed to me by two deeds recorded," &c. It was *held*, that the woodland passed to the grantee, although it was never owned by M. nor conveyed by his heirs to such grantor. *Winn v. Cabot*. 553

See ASSIGNMENT, 2.
DEED, 1, 2.
PARTNER, 11, 12.

CORPORATION.

Under the *St. 1819, c. 43*, providing, that corporations shall be continued bodies corporate for the term

of three years after the expiration of their charters, for the purpose of settling their concerns, but not for the purpose of continuing the business for which they were established, a bank is authorized, immediately before the expiration of such term of three years, to indorse a note held by it, to trustees appointed to wind up the affairs of the bank, and vested by it with all the powers of the corporation. [See Revised Stat. c. 44, § 7.] *Folger v. Chase*. 63

See CONSTITUTIONAL LAW, 1, 2.

COSTS.

See STATUTE.

TRUSTEE PROCESS, 5.
WAY, 5.

DAMAGES.

See LANDLORD AND TENANT, 2.

DEED.

In a deed of a parcel of land in which were a well and pump, an interlineation of the words "with pump and well of water," after the description of the land by metes and bounds, was *held* to be an immaterial alteration, as the effect of the deed would be the same without those words. *Brown v. Pinkham*. 172

2. In an action of trespass by a mortgagee of personal property against an officer who attached the property at the suit of a creditor of the mortgager, it was *held*, that the certificate of the town clerk on the mortgage, that it had been duly recorded in his office, could not be disproved, as against the mortgagee, by the production of a copy of the supposed record differing materially from the mortgage itself. *Ames v. Phelps*. 314

See FRAUD, 1, 2.

DEPOSITION

1. Where, at the taking of a deposition in another State, under a commission, (previously to the recent rule of court on this subject,) for the use of the plaintiffs, an attorney was present on their part, but no one was present for the defendants, it was *held*, that such deposition was nevertheless admissible in evidence; and that it was too late to take such objection, if it were valid, at the trial, it appearing that more than a year before the trial, it was known to the counsel who then conducted the defence. [Rules of the Sup. Jud. Court, No. 7.] *Farrow v. Commonwealth Ins. Co*. 53
2. A deposition taken under a commission directed, in the common form, to any justice of the peace, &c. is admissible in evidence, although it does not appear, that the person before whom the deposition was taken was a justice of the peace, otherwise than by his signature upon the deposition. *Adams v. Graves*. 355
3. *It seems*, that where a commission to take depositions, is directed to a person by name, it is immaterial whether he has any official character or not, as he would have sufficient authority to take the depositions, from the commission itself. *Ibid*.

DEVISE AND LEGACY.

1. A devise to a grandchild lapses, if the grandchild die in the lifetime of the testator, without leaving lineal descendants. *Ballard v. Ballard*. 41
2. A testator devised as follows: "I give to my sons, for the term of ten years after my decease, the improvement and income of my tavern farm," &c. "Item, I give and devise to my grandchildren, the sons and daughters of my said sons, after the

expiration of ten years from my decease, all those lands and tenements which I have now given the improvement of for ten years as aforesaid to my said sons, to have and to hold to them, their heirs and assigns forever." It was *held*, that this devise created a vested remainder in the grandchildren who were living at the decease of the testator, subject, however, to open and let in all those who might be born afterwards, whether born before or after the determination of the particular estate; and that the share of a grandchild who was living at the decease of the testator, but died before the expiration of the particular estate, descended to his father as his heir *Ibid.*

1. A testator gave to his daughter, a feme covert, "the interest of 50,000 dollars, from the time of his decease, during her natural life, at her decease the principal to be equally divided among her children;" and his executors, being residuary devisees and legatees, gave bond to the judge of probate for the payments of all the debts and legacies. It was *held*, that the testator did not intend to place the sum above mentioned in trust for his daughter, and secure to her the income thereof, but that he intended to give her a definite annual sum, equal to the lawful interest on 50,000 dollars, to be paid by his executors out of his estate. *Swett v. Boston.* 123

4. The statute of February 28th, 1831, § 2, provides "that persons entitled to the income of any personal property held by others in trust for themselves, or for the particular and special use of their wives, shall be taxed for the capital or principal sum." It was *held*, that under the foregoing bequest there was no "capital or principal sum" owned legally or equitably by, or held in trust or otherwise for

the testator's daughter, and that consequently she was not liable to taxation under this clause of the statute. *Ibid.*

5. An investment of 50,000 dollars, made by the executors, without the consent of the daughter, in trust to pay her the income, was held to have no effect upon her rights, in regard to taxation under the above provision of the statute. *Ibid.*
6. A testatrix, after bequeathing to the children of two of her sons substantial or nominal pecuniary legacies, and one cent to M. G., daughter of her daughter R., devised as follows: "I also give and bequeath unto E., daughter of my son J., and also to G. &c., children of my son G.," "and also to the children and heirs of my daughter M. S., and also to P., A., and children of E., which said P., A., and E. were children of my daughter R., an equal share of my property, that shall or may remain, &c., meaning that the child or children of each of my sons or daughters shall have that portion which would fall to their respective parents, as above described." It was *held*, that the legal effect of this will was to distribute the residue among the issue, excepting M. G., of those of her children who are mentioned in the residuary devise, *per stirpes*; and that a child of R., who was not named, was entitled to a proportionate share, as being included in the general description in such residuary devise. *Tucker v. Boston.* 162
7. Under *St. 1783, c. 24, § 8*, which provides, that a child or grandchild not having a legacy given him in the will of his parent or grandparent, shall have his proportion of the estate of the testator assigned to him, the presumption is, if the child has no legacy, that he was unintentionally overlooked; and to prevent the operation of the statute,

this presumption must be rebutted by evidence from other parts of the will. *Ibid.*

- 8 Where the grandchildren of a testatrix were very numerous, the relations complicated, and the testatrix advanced in years, and every grandchild, except one granddaughter, either by particular or general description, had a nominal or a substantial provision, it was *held*, that such granddaughter was entitled to a share under the statute, although her mother was named in the will. *Ibid.*

- 9 A testator gives to his wife the use of furniture during her life; he gives to A. C. all the residue of his estate, real and personal, upon the trusts that he shall receive the income of certain bank shares during the life of the wife and pay the same over to her, and that after her decease he shall hold the same shares and the future income thereof, upon the same trusts as are declared in respect of the residue of the estate subsequently mentioned; and the testator directs, that the residue of his *estate* and *property* shall be held in trust by the trustee, to *pay* and *convey*, distribute and divide the same among the testator's six children, so as that each shall have an equal portion of the estate and property conveyed in trust for their use; that one third part, to be ascertained as nearly as conveniently may be by the trustee, of what shall be the shares of the children respectively, shall be paid respectively to two sons, then of age, immediately after the testator's decease, to two other sons, when they shall respectively come of age, and to two daughters when they shall respectively come of age or be married; that one other third part shall be paid and conveyed to the children respectively when they shall arrive at the age of twenty-eight years; and that the residue shall be paid and conveyed to them when they

shall respectively arrive at the age of thirty-five years; that the interest, income and dividends of the property and estate which is not to be paid over to the children immediately after the testator's decease, shall be invested and allowed to accumulate, and when and as they shall come of age, or, if daughters, be married, the trustee shall pay to them respectively their shares of the interest and income already accumulated, and shall from time to time after they respectively come of age, pay over to each his share of the interest and income of the trust property as the same shall accrue, until the principal and property and estate shall be paid and conveyed to them as before directed; that in case of the death of a child without leaving issue, the trust property belonging to such child not paid before the death, shall be held by the trustee upon the trusts before declared, for the benefit equally of the surviving children; that the trustee shall keep the buildings belonging to the testator's estate, in good repair and insured against fire, and in case any building should be destroyed by fire, shall dispose of the land belonging thereto, and that he may, if he shall deem it for the interest of all concerned therein, sell a certain parcel of the real estate; and that he shall invest the proceeds of such sales, and all money which may be received on any policy on any building destroyed by fire, in city stocks, and shall hold the same upon the trusts before declared, for the benefit of the children; that if the wife should prefer it, the furniture may be sold by the trustee and the interest of the proceeds be paid to her during life, and the same proceeds, after her death, and any accumulation of interest that may be at that time, shall be held by the trustee upon the trusts before declared for the benefit of the chil

dren ; and that any trustee which shall be appointed in the room of the one named in the will, shall receive and take and hold the trust property upon the same trusts before declared respecting the same. It was *held* ; —

That a trustee appointed by the judge of probate in the room of the one named in the will, was entitled to exercise all the powers, and was bound by all the trusts, in the same manner as the one so named would have been entitled and bound : — *Richardson v. Morey.* 182

10. That the trustee was not obliged to transfer to the children equal portions of the personal estate and equal portions of the real estate, but that he might transfer to each one its share of the trust property, either in real or personal estate or both, his discretion not being limited, except that the personal estate was first to be distributed : —

Ibid.

11. That it was not the duty of the trustee forthwith to set apart the several shares of the children and hold them in severalty, but that the property was to remain in his hands to accumulate for the general benefit of all the children until distribution should be made as directed in the will : —

Ibid.

12. That during the life of the widow, the children were not entitled to have vested in them the legal interest and title in the bank shares or the furniture : —

Ibid.

13. That upon a child's coming of age, he was to be paid the accumulated interest on the whole of his share up to that time : —

Ibid.

14. And that a child entitled to the payment of one third part of his share, having died without issue, after receiving only a portion of such third part, the residue thereof was to be paid to his administrator, and not to be held by the trustee for the surviving children. *Ibid.*

15. A testator, without childrer, be-

queathed his personal property, with certain specific exceptions, to his wife, and then devised a portion of his real estate to his executors in trust to sell the same and pay his debts and certain legacies out of the proceeds. After the execution of the will, the testator sold that portion of his real estate and purchased other real estate. The Probate Court having refused to grant the executors a license to sell the after-acquired real estate of the testator for the payment of his debts, it was *held*, that the wife, who had petitioned that such license might be granted, was entitled to appeal ; and that the after-acquired real estate should be first applied to the payment of the debts, it being clearly the intent of the testator, that the personal estate bequeathed to his wife should be exempted from liability for such debts. *Lee, Appellant, &c.* 285

16. A testator, after devising one third of his real estate to his wife for her life, and reciting, that he had hitherto done something for his children when they were setting out in the world, according to his abilities, gave to his children, including F., the tenant, one dollar each, and then proceeded as follows : "And I constitute and appoint my son F. sole executor of this my last will and testament, and I give unto my son F. my wearing apparel and the whole of the farming utensils," &c. ; "and it is my will, that my said executor collect in all the money or debts I may have due to me at my decease, and also pay out and settle all the debts I may owe at my decease, and when my estate is all settled by my said executor, it is my will, that the remainder all go to my said son F." At the time when the will was made, the testator also executed a deed of a parcel of his real estate to the tenant, and gave it to a third person, to be delivered after the death

of the testator. The testator was possessed of no other personal property than that described in the will. The tenant lived with him for more than twenty years preceding his death; and no one of his other children lived with him during that period. It was *held*, that the remainder of the real estate of the testator passed to F. in fee, by the residuary clause of the will.

Dewey v. Morgan. 295

17. A testator devised certain real estate to his wife for her life, and "the remainder of his estate, whether real or personal, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned them." It was *held*, that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from aliening the same before the expiration of the life estate, was void. *Hall v. Tufts.* 455

18. A devise of "all my real estate," without words of limitation or inheritance, passes a fee simple. *Godfrey v. Humphrey.* 537

See CHARITY, 3.

DISCONTINUANCE.

See ACTION.

DOG.

Under St. 1812, c. 146, § 2, [Revised Stat. c. 58, § 12,] which authorizes "any person to kill any dog or dogs found and being without a collar," it is lawful to kill a dog if he is out of the inclosure of his owner, without a collar, although he be under the immediate care of the owner, and this be known to the person killing the dog. *Tower v. Tower.* 262

DOWER.

See CONTRACT, 4.
CONVEYANCE, 1, 7.

EQUITY.

See CONTRACT, 1.
MORTGAGE, 2

ERROR.

1. If a writ against two is served on only one of them, and judgment is rendered against both, both must join in a writ of error to reverse the judgment. *Gay v. Richardson.* 417
2. Error will not lie to reverse a judgment which might have been appealed from; but where a judgment is rendered against a defendant who has not had due notice of the suit, he has no opportunity to appeal, and may maintain a writ of error; and if one of several defendants has had notice, but has neglected to appeal, this will not affect the others. *Ibid*

See STATUTE.

ESTOPPEL.

See FRAUD, 4.
SALE, 3.
WAY, 2.
WILL, 2.

EVIDENCE.

1. Upon the question, whether a certain charge in an account of a general average loss, made up at New Orleans, was reasonable and customary, a deposition was offered in evidence, in which the witness, being asked to state all that he knew of a particular case tried at New Orleans, testified, that he did recollect the case, having been the secretary of the insurance company who were the defendants therein, and referred to a copy of the printed opinion of the Supreme Court of

- Louisiana, purporting to give the history of such case, which was annexed to the deposition, but he did not state that the law or the facts were known to him, or were truly reported. It was *held*, that such copy was inadmissible in evidence. *French v. Lowell*. 34
2. The plaintiff, in order to lay a foundation for the introduction of secondary evidence of the contents of a letter written by the defendant to a third person, filed his own affidavit setting forth, that such third person told him that the letter was lost. *Held*, that the affidavit was insufficient for that purpose, as the loss could have been proved by competent evidence, and the affidavit was mere hearsay. *Chapin v. Taft*. 379
3. The 12th article of the Declaration of Rights, which provides, that in criminal cases, the accused shall have the right "to meet the witnesses against him, face to face," is not violated by the admission of testimony in a criminal trial before a jury, to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace. *Commonwealth v. Richards*. 434
4. It is not sufficient, in such case, to prove the substance and effect merely of the testimony of the deceased witness, although the memory of the witness offered to prove such testimony, be aided by notes taken at the preliminary examination; but the whole of the testimony of the deceased witness upon the point in question, and the precise words used by him, must be proved. *Ibid*.
5. In an action for wood sold, the plaintiff having proved that the defendant had contracted to cut wood on the plaintiff's land, and that the defendant had admitted that he had cut wood, and that he owed the plaintiff therefor, the defendant alleged that the wood cut by him grew on the adjoining land of a third person. It was *held*, that the burden of proof was on the plaintiff to show that the wood was cut on his land, and not on the defendant to show that it was cut on the adjoining land. *Gilmore v. Wilbur*. 517
6. Evidence that the indorser of a note was frequently at a certain bank, transacting business there, and that he frequently paid notes there, was *held* sufficient proof of his being conversant with the usage of the bank to give notice to promisors to pay at the bank, instead of sending the notes to them and demanding payment. *Shove v. Wiley*. 558
7. A book kept by a bank, in which a clerk regularly entered certificates of his having given notices to the makers and indorsers of promissory notes, taken in connexion with his testimony that it was his practice to carry the notices personally to the house or place of business of the parties, and that he has no doubt they were carried as usual, in the case of a certain note mentioned in the book, though he has no recollection in relation to such note, is competent and sufficient evidence to prove that notices were so given in the particular case. *Ibid*.
8. Where such clerk produced a printed form, in common use, and testified to his belief that the notices in question were in the same form, it was *held* to be competent and sufficient evidence of this fact. *Ibid*.
9. Where, after land owned in common had been divided by commissioners, one of the tenants entered on that portion thereof which had been assigned to the other, and cut down and carried away a tree, it was *held*, that evidence of a parol license from such other tenant, granted previously on making a parol partition and renewed at the

time when the commissioners were dividing the land, was admissible to show that the act was done with his consent, although it was incompetent to control the effect of this last partition. *Kent v. Kent.* 569

See ATTACHMENT, 5.
DEED, 2.
DEPOSITION, 1.
LIMITATIONS, &c. 2.
MORTGAGE, 4.
POOR, 8.
POUND, 2.
RECORD, 1, 2.
SALE, 2.
SCIRE FACIAS, 1, 2.
TROVER.
WITNESS, 1, 2.

EXCEPTIONS.

See PRACTICE, 1.

EXECUTION.

1. The extent of an execution upon an estate for life, is not rendered invalid by the circumstance, that the reversioner acted as one of the appraisers. *Chamberlain v. Doly.* 495
2. Where an execution was extended upon real estate, and the certificate of the appraisers and the return of the officer, indorsed on the execution, recited, that the appraisers were "duly sworn," but it did not appear from such certificate and return, that they were sworn before any justice of the peace, it was held, that the extent was invalid. *Ibid.*

EXECUTOR AND ADMINISTRATOR.

1. Where, upon the application of the widow of an intestate for letters of administration, it appeared, that she was under the influence of a person who was indebted to the estate in a large amount, and who was charged with combining with the intestate in his lifetime

to defraud his creditors, and that such application was made at the request of such debtor and not to protect or subserve the interest of the widow, it was held, that she was an unsuitable person to administer. *Stearns v. Fiske.* 24

2. If a party applying for letters of administration is evidently unsuitable to discharge the duties of such trust, the judge of probate is authorized and is bound to deny his petition. *Ibid.*

See MORTGAGE, 1.
WILL, 2, 3.

FENCE.

See CONVEYANCE, 4
POUND, 6.

FOREIGN LAWS.

See ASSIGNMENT, 5.
EVIDENCE, 1

FRAUD.

- 1 In an action on a contract under seal, in which one of the contracting parties is seeking to enforce the contract against the other, the defendant may plead that the contract was obtained by fraud and imposition. *Hazard v. Irwin.* 95
2. In an action on a contract under seal, whereby the defendants became sureties that one P. should perform his contract with the plaintiff, which likewise was under seal, it was held, that the defendants might plead that P.'s contract was voidable by reason of fraud and imposition, and that P. in consequence rescinded it. *Ibid.*
3. Where the declaration averred that the plaintiff, by a contract under seal, sold and conveyed a steam engine to P., and that he gave P. an order for the engine, and that the defendants, by an instrument under seal, became sureties for the payment of the debt due by P., and the defendants pleaded that the

plaintiff falsely and fraudulently made representations as to the engine, by reason whereof the contract of sale was void and P. refused to perform the same, wherefore the instrument executed by the defendants was void, it was *held*, that as it did not appear by the record that the engine had been delivered to P., the plea was good, especially after verdict, although it did not aver that the engine, or the order for its delivery, had been returned to the plaintiff. *Ibid.*

4. *Held* also, that the defendants' contract, whereby they became sureties "for the payment of the debt due by P.," did not estop them from showing that the contract of sale was voidable and avoided, so that no debt was due from P. to the plaintiff. *Ibid.*

5. The averment in the defendants' plea, that the plaintiff falsely and fraudulently made certain representations respecting the steam engine, and that by reason thereof the contract between P. and the plaintiff was void and P. refused to perform it, was considered, after verdict, as equivalent to an averment that P. had rescinded the contract. *Ibid.*

6. It appeared that the plaintiff falsely and fraudulently represented to P., that the engine was a twenty-horse power engine; that it was fit for mining purposes; that it was in good order and had been so certified by engineers; that it was free from rust; that it had been standing but two or three years. It was *held*, that these false representations related to matters of fact and not of opinion; and that as they were material to the interests of P., and had a tendency to prevent him from inquiring into the condition of the engine, and as he reposed confidence in them, they rendered the contract of sale voidable by him. *Ibid.*

7. *Held* also, that P. was a competent witness for the defendants to prove

such misrepresentations, he not being liable to the defendants for the costs of the action against them. *Ibid.*

8. If, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, to be true, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not. *Ibid.*

See ASSIGNMENT, 7.
CONVEYANCE, 3.

FRAUDS, STATUTE OF.

1. The defendant having contracted to board the respondent's laborers at his expense, it was verbally agreed between the defendant, the respondent, and a third person, that the latter should deliver and charge provisions to the defendant, and the respondent would see him paid therefor. *Held*, that this promise of the respondent was within the statute of frauds. *Cahill v. Bigelow and Tr.* 369

2. W. being indebted to the plaintiff in the sum of \$10.31, agreed to pay him in labor, the plaintiff saying, that when he was ready he would call on W. Afterwards W. agreed to work for the defendant; and while he was so employed, the plaintiff went with him to the defendant, and asked the defendant if he would give him up; but the defendant replied, that he would not, and that he would see the debt paid or would pay the debt; and W., in consequence of such promise, remained in the defendant's employment. The Court were inclined to think, that there was a sufficient consideration for the promise of the defendant, in the benefit which he received from the continuance of W. in his employment; but they *held*, that, as there was no evidence that the plaintiff discharg-

ed his claim against W., such promise, not being in writing, was void by the statute of frauds. *Stone v. Symmes.* 467

3. The provision in the statute of frauds, that no action shall be maintained on any agreement that is not to be performed within one year from the making thereof, unless the same be in writing, does not extend to an agreement that one party may cut certain trees on the land of the other at any time within ten years, for such an agreement may be performed within one year. *Kent v. Kent.* 569

See TRUSTEE PROCESS, 4.

FRAUDULENT CONVEYANCE.

1. A mortgage of real estate was made to secure the payment of a negotiable promissory note, and the mortgagee, not being in possession, assigned the mortgage, during the pendency of an action against him for slander, in order to avoid more effectually the judgment which might be recovered against him, and subsequently died insolvent, and his administrator assigned the same mortgage to a *bonâ fide* purchaser, for a valuable consideration. It was *held*, that the prior assignment was fraudulent, and that it was void, under *St. 27 Eliz. c. 4*, as against such subsequent purchaser. *Clapp v. Leatherbee.* 131
2. A father conveyed his life estate in certain land to his son, on condition, that whereas the son had agreed to support the father during his life, and the father was desirous of remaining in possession for the purpose of securing such support, the deed should be void if the son should fail to furnish such support, or should disturb the father in the peaceable possession of the land. It was *held*, that such deed was not *per se* fraudulent as against creditors of the father, but was open to

explanation ; and that the stipulation as to the support of the father and his remaining in possession, was a condition, and not a reservation defeating the grant. *Slater v. Dudley.* 373

See CONVEYANCE, 3.

FREIGHT.

See TRUSTEE PROCESS, 8.

GUARANTY.

1. Where a note was guarantied to be "good and collectable two years," it was *held*, that the guarantee was liable upon his contract, at any time after the note became due within the two years. *Marsh v. Day.* 321
2. The defendant, being the payee of a negotiable note, payable in four annual instalments, indorsed it to the plaintiff, stating that he would guaranty it, and the plaintiff wrote over the payee's signature the words, "I order the within note paid to T. [the plaintiff] and guaranty the payment of the same," and the defendant assigned to the plaintiff a mortgage given as security for the note. No demand was made on the promisor to pay the note, and he remained solvent for six months after the last instalment became due, and was permitted to receive the profits of the mortgaged property for three years after that time ; and notice of the non-payment two years afterwards was given to the defendant and a demand of payment made on him. It was *held*, that the defendant was a guarantee, and not a surety, and that he was discharged from liability by the laches of the plaintiff in not using due diligence to obtain payment from the promisor and not giving the defendant seasonable notice of the non-payment. *Talbot v. Gay.* 534

GUARDIAN.

1. In general, if a guardian neglects to put his ward's money at interest, he will be charged with interest; and in cases of gross delinquency, with compound interest. *Boynston v. Dyer.*
2. A guardian is entitled to a reasonable time in which to make an investment of his ward's money. *Ibid.*
3. Where a guardian had settled two accounts in the Probate Court without charging himself with interest, and no adjudication was made on this subject, it was *held*, that on the presentation of his third account he should be charged with interest, from an early period after his appointment, in the same manner as if no previous account had been settled. *Ibid.*
4. But if the question of interest had been put in issue and decided on the settlement of the former accounts, it could not be revised so long as the former decrees remained in force. *Ibid.*
5. Where a party interested in the estate of a ward, certified his approval of an account in which the guardian had not charged himself with interest, but no discussion or controversy was had on this subject, it was *held*, that he was not precluded from having the error corrected when the guardian presented a subsequent account for allowance in the Probate Court. But where a ward, seven months after coming of age, certified that his guardian's final account was correct, and gave him a release of all demands, he was not permitted to open the settlement because the guardian had not charged himself with interest. *Ibid.*
5. In a guardian's account the interest for a year should be added to the principal, and the current expenses of the year should be deducted from the amount, and the balance will be the principal for the

next year; and so on from year to year. *Ibid.*

See SPENDTHRIFT.
WILL, 2, 3.

HOUSE OF CORRECTION.

See POOR, 5, 6, 7.

HUSBAND AND WIFE.

1. Husband and wife may join in an action of the case for an obstruction of a way appurtenant to the wife's land, in their occupation or possession. *Cushing v. Adams.* 110
2. In such an action, an averment in the declaration, that the plaintiffs were seised of the land in demesne as of fee in right of the wife, was *held*, after verdict, to include virtually an averment of occupation or possession. *Ibid.*

See CONVEYANCE, 1.

INCUMBRANCE.

See CONTRACT, 4.

INFANT.

See POOR, 1, 2, 5, 6, 7.

INSOLVENT ESTATE.

The proper evidence of the rejection of a claim laid before commissioners on an estate represented insolvent, is the report of the commissioners and the acceptance thereof by the Court of Probate; and notice given of an intention to prosecute a suit at law on such claim, and a suit brought thereon, after the commissioners had in fact rejected the claim, but before their report was returned and accepted, were held to be premature. *Goff v Kellogg.* 256

See SET-OFF.

INSURANCE.

1. Two days before the expiration of a policy, fully insuring a vessel on

time, the defendants made a policy insuring the same vessel, at and from Boston to Charleston, the second policy providing, that if the assured should have made prior insurance upon the vessel, then the defendants should be chargeable only for so much as the amount of such prior insurance should be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another. The vessel sailed from Boston before the expiration of the first policy, but was lost after it had expired. It was *held*, that the second policy attached, notwithstanding the first policy continued in full force till after the vessel had sailed from Boston, and that the defendants were consequently liable for the loss. *Kent v. Manufacturers' Ins. Co.* 19

2. By a policy of insurance on a vessel, the defendants "caused C. & L., for the owners, payable to C. & L., to be insured." It was *held*, that an action might be maintained on such policy in the names of such owners, with the consent of C. & L., it not appearing that the defendants had any claim against C. & L. *Farrois v. Commonwealth Ins. Co.* 53

3. A vessel insured at Boston, struck on Carysford reef, while on a voyage to Mobile, and was injured to the amount of more than half her value, but was got off and arrived in safety at Mobile. While she was lying at a wharf in that port, a survey was held upon her, and the surveyors having recommended a sale, she was sold by the master, who was also a part owner and one of the insured, without consulting the insurers or the agent of the owners at Boston. It was *held*, that the master, as such, was not justified, under these circumstances, in selling the vessel. *Peirce v. Ocean Ins. Co.* 83

4. In the same case it appeared, that when the facts became known in Boston, the agent before mentioned, to whom, by the policy, the loss was made payable, called on the insurers with the protest and the other usual documents to prove a loss, and a statement setting forth a claim for a salvage loss on the vessel incurred in consequence of her getting on the reef on her voyage to Mobile, at which place she was surveyed, condemned and sold for the good of all concerned, the insurers being charged therein with the value of the vessel and credited with the proceeds of the sale, and demanded payment of a total loss; and that an action was subsequently brought by such agent against the insurers, claiming as for a total loss, the declaration averring the interest to be in the master and the other part owners *jointly*. It was *held*, that under such declaration no distinction could be made between the rights of the other part owners and those of the master, who could not set up his own unauthorized act as the foundation for a claim for a total loss, and who was also incapacitated from making an effectual abandonment, by the sale, which passed his interest in the vessel as a part owner; that (*semble*) the other part owners, by joining in the claim against the defendants, in which they set forth the sale and credit the insurers with the proceeds, ratified the sale, and so disqualified themselves to abandon; that there was not in fact an abandonment, there being no relinquishment of the vessel or of any interest therein; that if it could be considered that an abandonment was made by implication, it was made on the ground that the vessel had been condemned and sold, which did not warrant the owners in abandoning, and they could not avail themselves of the ground that the vessel was injured, by striking on the reef, to

- the amount of more than half her value ; and, consequently, that there was not such an abandonment, as would relate back to the time when the loss occurred, so as to constitute the master the agent of the insurers, thereby throwing on them the responsibility for such unauthorized sale, and thus render them liable as for a total loss. *Ibid.*
5. In the case of a double insurance, by two insurers, the party insured may elect to consider each insurer as liable to bear a proportionate share of a loss, and recover accordingly ; or to require either of them to pay the whole ; in which latter case, the one who pays the whole or a disproportionate part of the loss, would have a remedy against the other for a contribution. *Wiggin v. Suffolk Ins. Co.* 145
6. Where in such case the party insured commenced an action on both policies at the same time, and one of the insurers paid into court one half of the actual loss, (first making certain deductions by way of set-off,) and the insured took the money out of court, it was *held*, that this was *prima facie* evidence, that he had made his election to consider each insurer responsible for one half of the sum actually at risk. *Ibid.*
7. A vessel was insured by the defendants, by a policy providing that any "loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the insurers from the insured, when the loss becomes due, being first deducted ; and all sums coming due being first paid or secured to the satisfaction of the insurers, they discounting interest for anticipating payment." At the same time the insured gave the defendants a bottomry bond on the vessel, with sureties. Subsequently a policy on another vessel was underwritten by the defendants for the same person, containing the like provision respecting sums due and coming due to the insurers, and a provision prohibiting the insured from assigning the policy without the insurers' previous consent. This second policy was assigned to the plaintiff, with their consent, they "reserving to themselves all the rights expressed in the policy regarding premium notes, debts, &c." The first policy was not assigned. In an action by the assignee of the second policy for a loss, it was *held*, that the insurers must deduct from a loss on the first policy, all premium notes due from the insured, whether given before or after the assignment of the second policy, and must deduct the balance of such loss from the sum due on the bottomry bond ; and that they had a right to set off the balance remaining due on the bond after such deduction, against the plaintiff's claim, without first resorting to the vessel bottomried or to the sureties on the bond." *Ibid.*
8. Where an underwriter assented to an assignment of the policy, "reserving his rights expressed in the policy," and by the terms of the policy any loss was to "be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the underwriter from the insured when such loss becomes due, being first deducted," it was *held*, in an action by the assignee to recover a loss, that the underwriter was entitled to deduct the amount of premium notes given by the assignor for policies underwritten subsequently in the ordinary course of business, and without any fraudulent intent to defeat the assignment. *Wiggin v. American Ins. Co.* 158
9. In the same action it was *held*, that the underwriter, having a claim against the assured on the bottomry bond, had a right to deduct the

amount of his claim from the loss on the policy, and was not obliged to resort to the surety on the bond, though solvent, in relief of the assignee of the policy. *Ibid.*

1. The plaintiff obtained insurance against fire on his one-story framed store, occupied by him, without disclosing the fact that it stood on the land of another person under a verbal agreement terminable, at the pleasure of such person, upon six months' notice, neither was any inquiry made by the insurers in regard to his title. It was *held*, that there was not a concealment of a material fact, and that the policy therefore was not void. *Fletcher v. Commonwealth Ins. Co.* 419

1. Where property was insured by a mutual insurance company to an amount founded on a representation made to them in regard to its value by the assured, and with the knowledge, or the means of knowledge, of the situation and actual value of the property, and the assured paid a premium and assumed liabilities as a member of the company, proportioned to the amount insured, it was *held*, that in the absence of fraud, the company was liable for the whole of such amount, although it exceeded the value of the interest of the assured. *Borden v. Hingham Mutual Fire Ins. Co.* 523

INTEREST.

See ASSIGNMENT, 9.

GUARDIAN, 1, 2, 3, 4, 5, 6.

JAIL.

See POOR, 5, 6, 7.

JUDGMENT.

1. In an action of debt on a judgment of the Court of Common Pleas, the judgment cannot be impeached or avoided as erroneous by plea; but the remedy is by writ of error. *Cook v. Darling.* 393

2. In case for the continuance of an obstruction to a private way, it was *held*, that a judgment in favor of the defendant, on the general issue, in a former action between the parties for the same obstruction, although admissible in evidence, was not a bar to the action. *Kend v. Gerrish.* 564

See TRUSTEE PROCESS, 6.

JURY.

See NEW TRIAL, 1, 2.

JUSTICE OF THE PEACE

See RECORD, 1, 2.

LANDLORD AND TENANT.

1. An obstruction of a way appurtenant to land in the occupation of a tenant at will, may be an injury to the lessor, although it do not affect the reversion, nor cause an abatement in the rent; consequently the lessor may maintain an action of the case for such obstruction, upon showing that he has been damaged thereby. *Cushing v. Adams.* 110

2. A farm and a certain number of sheep were leased, "to hold one year from the 1st of April, 1833, reserving 550 lbs. of wool of a quality of an average with the flock;" and it was further stipulated in the lease, that the sheep should not be counted to the lessee till after shearing in June 1833, and that they should be counted back to the lessor after shearing in June 1834. The lessee sheared the sheep in June 1834, and sold the wool. In trover by the lessor against the lessee and his vendor, it was *held*, that from April to June, 1834, the lessee had neither the general nor special property in the sheep, nor the legal custody or possession, but that he had a right by

implication to enter on the farm at a suitable time to shear them and count them out to the lessor ; that the general property in the sheep, and consequently in their wool, was in the lessor, and the implied stipulation, that the lessee should have all the wool over 550 lbs, was an executory contract, which vested no property in the lessee in any part of the wool before a separation of the 550 lbs. from the remainder, and as no separation had taken place at the time of the sale and of the lessor's demand of the wool, the property continued in the lessor ; that the measure of the plaintiff's damages was the value of the 550 lbs. at the time of the conversion ; that as the two defendants were together, and both in possession of the wool, and both refused to deliver it up on demand, there was a joint conversion which would sustain an action against them jointly ; and that it was not necessary for the plaintiff to prove that the vendee had notice of the invalidity of the lessee's title. *Chamberlin v. Shaw.* 278

- 3 The owner of a parcel of land sold a furnace and other buildings situated thereon, and subsequently leased to the purchaser, his heirs and assigns, the land and water privilege on which the furnace stood, the purchaser covenanting to pay "the sum of \$ 10 a year, so long as he should keep the furnace and buildings on the land, in full for the rent of the premises" ; but the furnace was suffered by the purchaser to go down, he, however, continuing to pay or tender the rent, and one of the buildings was appropriated to another use. It was *held*, that this was a lease for so long a time as the purchaser, his heirs and assigns, should keep the furnace and buildings on the land ; and that it could not be terminated by the lessor, under these circumstances, until a reasonable time

should have been allowed to the purchaser to rebuild the furnace, it not appearing, affirmatively, that he had abandoned it. *Cook v. Bisbee.* 527

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

If a party having a right of way licenses the owner of the soil to build an arch over the way, but such owner unnecessarily and unreasonably obstructs the way in building the arch, an action on the case will lie for the abuse of the license. *Cushing v. Adams.* 110

See CANAL.

EVIDENCE, 9.

LICENSED HOUSES.

A person, licensed as an innholder, common victualler and retailer, under *St. 1832, c. 166, § 8*, [Revised Stat. c. 47, § 21.] which provides, that the county commissioners may license persons "as innholders, common victuallers, or retailers or sellers of wine, beer, ale, cider, or any other fermented liquor," is not authorized, in virtue of his capacity of an innholder and retailer under such license, to sell spirituous liquors. *Commonwealth v. Jordan* 228

LIMITATIONS, STATUTE OF

1. Where all the items of an account between the plaintiff and the defendant, as merchants, bore dates more than twenty years antecedent to the commencement of the action, it was *held*, that a small item to the debit of the defendant, dated within twenty years but at a time when

the defendant had ceased to be a merchant, such item not being of a mercantile character, would not revive the whole account against the defendant. *Hancock v. Cook*. 30

- 2 In an action upon an account which, with the exception of an item of cash paid to the plaintiff by the defendant, was barred by the lapse of time, it was *held*, that the original entry of such item by the plaintiff in his books, verified by his own oath, was not competent evidence to rebut the presumption, arising from the lapse of time, of the payment of the residue of the account. [See Revised Stat. c. 120.] *Ibid*.
- 3 The filing of a claim in set-off, by a defendant, is equivalent to the commencement of an action thereon, so far as regards the statute of limitations; and if the plaintiff discontinues his action, the defendant may prevent his claim from being barred by the statute, by commencing an action thereon within three months thereafterwards, although the time of limitation have expired. *Hunt v. Spaulding*. 521
- 4 In an action of assumpsit, which was pending at the time when the Revised Statutes went into operation, and in which the statute of limitations had previously been pleaded, the plaintiff was not allowed to avoid the bar by bringing his case within the provision of the Revised Stat. c. 120, § 9, that if the debtor shall be absent from, and reside out of, the State, the time of his absence shall not be taken as a part of the time limited for the commencement of the action. *Battles v. Pobes*. 532

LUNATIC.

See POOR, 3, 4.

MANDAMUS.

See WAY, 5

MILL.

See CONVEYANCE, b, 6, 8.

MORTGAGE.

1. Where land was twice mortgaged, and, after condition broken, the mortgager was appointed administrator of the second mortgagee, and returned an inventory in which the debt due from himself was included, it was *held*, that he was nevertheless entitled, in his capacity of administrator, to redeem as against the assignee of the prior mortgage, who had purchased the mortgager's equity of redemption, the taking out of administration not being deemed, in respect to such assignee, a payment of the debt due to the second mortgagee, and an extinguishment of the mortgage. *Kinney v. Ensign*. 232
2. Where a mortgage deed of personal property sets forth, that the mortgage is made to secure the payment of a promissory note on which the mortgagee is surety for the mortgager, proof of the execution and registry of such mortgage is *primâ facie* evidence of title to the property in the mortgagee, without the production of the note, such note not being presumed to be in his possession; and the burden of proof is on the party contesting the title of the mortgagee, to show that there was no such note. *Davis v. Mills*. 394
3. A mortgagee of personal property, not in possession, is not chargeable as the trustee of the mortgager; but a creditor of the mortgager may have a remedy under St. 1829, c. 124, [Revised Stat. c. 90, § 78 *et seq.*] as well where the mortgagee is in possession, as where he is not. *Central Bank v. Prentice and Tr.* 396
4. Where a note was given to "E. H." for a certain sum, payable on demand with interest, and some

months afterward the promisor made a mortgage to E. H. 3d, conditioned for the payment of a note of the same date, for the same sum, payable on demand with interest, it was *held*, in an action on the mortgage, that parol evidence was admissible to show that E. H. and E. H. 3d were partners doing business in the name of E. H., and that the note to "E. H." was given for a debt due to the partnership, and was the note referred to and secured in the mortgage. *Hall v. Tufts*. 455

5. An agreement made upon the sale of land, that the vendee shall not sell it without first offering it to the vendor, does not preclude the vendee from mortgaging the land to a third person, to secure the payment of a debt, without making such offer. *Lovering v. Fogg*. 540
6. Where such vendee gave an absolute deed of the land to a creditor, with notice of such a contract, upon his agreeing, verbally, to execute a bond to reconvey the same on receiving payment of the debt, it was *held*, that the subsequent execution of the bond related back, so that as between the parties themselves the deed and bond constituted a mortgage, and that the original owner, therefore, was not entitled to a decree for a specific performance of the contract to reconvey. *Ibid*.

See CONVEYANCE, 2, 7, 10.

DEED, 2.

PARTITION.

RELEASE, 2.

REPLEVIN, 2.

NEW TRIAL.

- 1 Where the evidence is clear and strong and the law is explicitly stated to the jury, and they decide against the law, the Court will set aside the verdict, because it must, in such case, be apparent, that the jury have either unintentionally err-

ed, by mistaking the terms of their instructions, or have misapprehended the weight of the evidence, or have mistaken their duty, or abused their trust; but this will be more readily presumed in the case of a single verdict, than where there have been two verdicts the same way. *Cunningham v. Mangum*. 13

2. But where the question is purely matter of fact, and there is evidence for the jury to weigh and balance, and presumptions are to be raised and inferences drawn, and the jury may be presumed to have fairly exercised their judgment, the Court will not feel authorized to set the verdict aside, although the Court, upon the same evidence, would have decided the other way; more especially where the verdict is against the party having the burden of proof. *Ibid*

NON COMPOS.

See WILL, 1, 2, 3.

NOTICE.

See ATTACHMENT, 6.

EVIDENCE, 6, 7, 8

POOR, 3, 4.

WAY, 1.

PARISH.

The defendants and others, inhabitants of a parish, subscribed for the purchase of a bell, to be raised and hung in the parish meetinghouse under the direction of a committee of the subscribers, and the parish voted, "that the subscribers for a bell have leave to place the same in a convenient place in the meetinghouse to be rung," and that it "should be the property of the subscribers, subject to their control and direction." After it had been hung up in the meetinghouse for several years, and had been rung, during that time, for all parish purposes, it was removed by the de-

feudants. In an action of replevin by the parish against the defendants, putting in issue the plaintiffs' title to the bell, it was *held*, that as the record of these votes, which was contained in a book purporting to be the parish records, was admitted in evidence at the trial, as a parish record, without objection, and made a part of the case, it could not be afterwards objected by the parish, that such record was not attested by the parish clerk; that it was immaterial, so far as regarded the rights of the parish, whether the warning of the meeting at which such votes were passed, was strictly in pursuance of law or not, as the votes showed how and when the bell was received, and so rebutted the presumption of any other acceptance by the parish; and that such votes rebutted any presumption of a donation to the parish, which might, perhaps, otherwise be raised from the unexplained possession and use of the bell by the parish. *Fourth Parish in West Springfield v. Root.* 318

PARTITION.

If the owner of an undivided portion of land, mortgage it, and the land remain in the possession of the mortgager or of a co-tenant, the mortgagee is entitled to partition, the possession of the mortgager or co-tenant being equivalent to possession by the mortgagee. *Rich v. Lord.* 322

See EVIDENCE, 9.

PARTNER.

1 By articles of copartnership between T. and J., T. was to furnish as stock the sum of 20,000 dollars, and J. was to manage the business and with the proceeds of sales to keep up the stock at its original value, and the profits were to be divided equally between them; and at the termination of the partner-

ship J. was to deliver up to T. the stock then remaining, to the value of 20,000 dollars, losses by bad debts, decay of goods, and inevitable accidents excepted. It was *held*, that such losses should be regarded as diminishing the profits, and were not to be deducted from the capital stock so long as there was a surplus of property above 20,000 dollars. *Leach v. Leach.*

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2. *Held* also, that under these articles, the representatives of T. were not entitled, at the termination of the copartnership, to require J. to sell the capital stock and pay over to them 20,000 dollars in money, but that J. had a right to deliver to them the stock specifically. *Ibid.*

3. Under the same articles, it being stipulated that T. should furnish as stock the sum of 20,000 dollars, and that the stock in trade in his store should be taken as a part of that sum at a just appraisement, and that at the termination of the partnership J. should deliver up to T. the stock then remaining, to the value of 20,000 dollars, and J. having in fact taken T's stock in trade, at cost, without an appraisement, it was *held*, that he must nevertheless, at the termination of the copartnership, deliver up stock, not of the cost, but of the value, of 20,000 dollars. *Ibid.*

4. The facts, that T. appointed J. the executor of his will, and in bequeathing the partnership stock in trade to his widow and children, directed that the widow should receive her portion of the goods at the cost, were *held* not to affect the liability of J., under the articles of copartnership, to deliver up stock to the value of 20,000 dollars.

Ibid.

5. If one partner take a new lease, in his own name, of the store in which the partnership business is transacted, for a term of years extending beyond the term of the copartner-

ship, he must account to his copartner for the profits, if any, arising from this new lease. *Ibid.*

6. A contract under seal was executed by the plaintiffs, of the one part, and by B, for himself and his copartner T, (but without authority from T,) in the partnership name, of the other part, for a purpose within the scope of the partnership, namely, the erection of a dam for the company, and the plaintiffs thereupon provided the materials and built the dam, but did not finish it until after the partnership was dissolved. It was *held*, that T was not liable on the sealed instrument, but that as the supposed contract which the plaintiffs undertook to perform, between themselves and the company, had no existence, he was liable upon an implied promise for the work performed and materials furnished before the dissolution of the partnership. *Van Deusen v. Blum.* 229

7. A partnership between the plaintiff and defendant having been dissolved, the plaintiff agreed to pay all the debts against the company, and the defendant agreed, in writing, that a certain sum was the final balance of accounts between them as partners. It was *held*, that the plaintiff might, before paying the outstanding partnership debts, maintain assumpsit against the defendant, to recover the sum thus agreed to be the final balance, the defendant, if compelled to pay any of such debts, having his remedy on the plaintiff's agreement. *Dickson v. Granger.* 315

8. Where, after the dissolution of a partnership between W. and C., a creditor of the firm stated an account in which they were charged with certain goods purchased by them, and, at the same time, stated a separate account of his dealings with W., who had assumed the adjustment of the partnership concerns, in which account W. alone

was charged with another partnership debt, it was *held*, that C. was not discharged from such other partnership debt thereby; but that whether he was discharged or not, no one but C. could avail himself thereof, and a note given by C., either by way of security or satisfaction of such debt, would be founded on a good consideration. *Averill v. Lyman.* 346

9. Where the individual note of a partner, payable to the firm of which he was a member, remained in the possession of such firm till it was overdue, it was *held*, that another partner could not, after the dissolution of the partnership, negotiate it in the partnership name, although he was authorized to settle its concerns. *Parker v. Macomber.* 505

10. But where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm in payment of a debt, it was *held*, that such note, being payable to bearer, might be legally transferred to a third person, by another partner who was authorized to settle the concerns of the partnership. *Ibid.*

11. A. and B. being the only copartners in one company, and being likewise partners with other persons in two other companies, A. made a deed poll to B., of all the grantor's interest in certain real estate and in the personal property of the three companies, the deed being nominally for a pecuniary consideration and containing a covenant that the grantee would indemnify the grantor against all the debts due from the three companies. The deed was accepted by the grantee, but was not executed by him. It was *held*, that as the grantee would be liable in assumpsit, as upon an implied promise to pay the creditors and indemnify the grantor, this was a valid consideration for the deed, as against part-

nership creditors of A. and B.
Guild v. Leonard. 511

12. So B. having afterwards, by deed poll, conveyed all his interest in the same real estate and in the property of one of the three companies, "in consideration of one dollar paid by the grantees, and they becoming obligated to pay the debts of the same company," and the deed having been accepted by the grantees, though not executed by them, and they having paid those debts, it was *held*, that the deed was founded on a valid consideration as against partnership creditors of A. and B.
Ibid.

See ASSIGNMENT, 13.

PAYMENT.

See BILL OF EXCHANGE, &c., 4.

PLEADING.

See FRAUD, 1, 2, 3, 5.
HUSBAND AND WIFE, 2.
REPLEVIN, 1.

POOR.

1. Under *St.* 1793, c. 34, [Revised Stat. c. 45, § 1,] where a minor, deriving his settlement from his mother, resided in another State, employed in learning a trade, and the mother acquired a new settlement in this Commonwealth by a second marriage, before he came of age, it was *held*, that his settlement followed that of his mother.
Great Barrington v. Tyringham. 264
2. *It seems*, that the circumstance, that the minor was not bound as an apprentice by indenture, is not material in such case. *Ibid.*
3. Under *St.* 1834, c. 150, requiring the town in which a pauper lunatic resides at the time of his commitment to the State Lunatic Hospital, to pay the expense of supporting him while there, and giving to such town a remedy over against the

town in which the lunatic has a legal settlement, notice of the expense incurred, given by the former town to the latter within three months after the hospital had demanded payment, was *held* to be seasonable notice to render the latter town liable to the former. [See Revised Stat. c. 48.] *Worcester v. Milford.* 373

4. But whether any notice was necessary, *quære.* *Ibid.*
5. Where an alien woman, having a nursing infant, which stood in need of immediate relief, was committed to a jail or house of correction, it was *held*, that such infant was not within the provision of any of the statutes making the support of convicts and persons confined on criminal prosecutions a charge upon the Commonwealth. *St.* 1794, c. 48, § 1. [Revised Stat. c. 143, § 15, 16.] *Walson v. Cambridge.* 470
6. If the town in which the house of correction is situated, after due notice and request by the master thereof, refuse to assume the support of such infant, the master may recover against the town, the expenses incurred by him on account of such infant, for clothing, medicine, washing, &c. *Ibid.*
7. But he cannot recover against the town for any articles of food and nourishment furnished the mother in consequence of her having an infant at the breast, different from, and in addition to, what he was required to furnish to other inmates of the house of correction; but the expenses thereof are chargeable to the Commonwealth, in the same manner as the general support of the mother. *Ibid.*
8. If, in order to show that a person was prevented from gaining a settlement in a town, by being warned to leave within one year after he came to reside there, pursuant to *St.* 4 W. & M. c. 13, and *St.* 12 & 13 Will. 3, c. 10, it be proved

merely, that such a warrant was issued, served and returned to the Court of Sessions, it cannot be presumed in the absence of all other evidence upon the subject, that the return on such warrant certified that he was warned within one year after he came to reside in such town, although the first mentioned statute required in such case, that the time of the abode of the person warned, in the town, and when the warning was given, should be returned. *Franklin v. Dedham.* 544

POUND.

1. If a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion. *Stevens v. Curtis.* 227
2. Where a horse *damage feasant* in an inclosure was impounded by the owner of the land, and subsequently sold by auction in due form of law, for the indemnification of such owner, it was *held*, in an action of replevin brought by the original owner of the horse against the purchaser, that the declarations of the owner of the land, offered in evidence to show that the impounding was illegal, were not admissible, especially such as were made after the sale. *Lyman v. Gipson.* 422
3. Where cattle break into a close, the owner of the close has a remedy under the process of distress, for damage done by the cattle to personal property therein. *Ibid.*
4. Appraisers appointed to estimate the damage done by cattle distrained *damage feasant*, are not limited to the amount of damages claimed by the owner of the close in the notice of distress given by him to the owner of the cattle. *Ibid.*
5. The owner of a close having impounded a horse doing damage therein, sent a notice to the owner of the horse containing these words: "I have taken up as an *estrays*, doing damage in my inclosure, a horse belonging to you"; "and my damages are six dollars." It was *held*, that a sale of the horse in the manner prescribed by statute, in the case of animals taken up *damage feasant*, was nevertheless valid, the word *estrays* not being used technically in such notice. *Ibid.*
6. Under *St.* 1785, c. 65, § 3, [Revised Stat. c. 113, § 4,] providing, that any person injured by cattle in his lands "that are inclosed with a legal and sufficient fence," may maintain trespass against the owner of the cattle, or distrain them, it was *held*, that where cattle unlawfully going at large in a highway broke into a close adjoining thereto, the owner of the land was entitled to such remedies, although the land were not inclosed with a sufficient fence, against the highway, he not being bound to fence against cattle unlawfully at large in the highway. *Ibid.*

See CONVEYANCE, 4.

PRACTICE.

The decision by a single judge of this Court, of a question of fact, upon the hearing of a probate appeal, may be excepted to, and may be revised by the whole Court, if the judge fully reports the evidence. It is, however, within the discretion of the judge, at such hearing, to sustain a motion for the revision of his judgment as to matters of fact, and report the evidence, or not. *Stearns v. Fiske.* 24

See ACTION, 1, 2, 3.
APPEAL, 1, 2.
DEPOSITION, 1.
WITNESS, 1.

PRINCIPAL AND AGENT

See TRUSTEE PROCESS, 1

PRINCIPAL AND SURETY.

See ATTACHMENT, 1, 2, 3.
GUARANTY, 2.

PROBATE COURT.

See APPEAL, 1, 2.
DEVISE, &c. 15.
EXECUTOR, &c. 2.
GUARDIAN, 3, 4, 5.
PRACTICE.

RECORD.

- 1 Upon an appeal from the judgment of a justice of the peace, to the Court of Common Pleas, if it appear, that the justice died before extending the record of his proceedings in form, his original minutes containing all the material facts which the record would have comprised, will be regarded as substantially a record. *Davidson v. Slocomb.* 464
2. If, in such case, the appellant is prevented by the death of the justice from producing in court a copy of the whole case attested by the justice, in pursuance of *St. 1783, c. 42, § 6*, [*Revised Stat. c. 85, § 15,*] the deficiency may be supplied by a sworn copy. *Ibid.*

See DEED, 2.

RELEASE.

1. In construing releases, especially where the same instrument is to be executed by various persons, standing in various relations and having various kinds of claims against the releasee, general words, though the most comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the demands to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. *Rich v. Lord.* 322
- 2 A mortgager of real estate assigned his property upon the trust, that the assignees should, in the first place, pay certain of his debts in full, including a sum for the payment of which the mortgagee and one of the assignees were liable as sureties of the assignor, but not secured by the mortgage, and then the claims of such other creditors as should become parties to the assignment, *pro rata*, and embodied in the assignment a schedule of the property assigned, in which the real estate was described as subject to the mortgage, and also a schedule of the unpreferred creditors, in which the mortgagee was not mentioned; and the mortgagee executed a release, by which the creditors released the assignor "from all and singular their several claims and demands against him, of every name and nature" It was held, that the mortgagee did not thereby release the mortgage debt. *Ibid.*
3. Where an insolvent debtor made an assignment of his property in trust for his creditors, "a schedule and estimate of the amount of whose several debts is hereunto annexed," and the assignment contained a release, to be executed by the creditors, of "all sums of money due and owing or to become due to them respectively," "and also all their respective claims and demands whatsoever," and the name and the precise amount of one of the claims of a creditor, were inserted in the schedule, it was held, that such creditor did not, by executing the release, discharge a note recently executed by the debtor, as principal, and a third person, as surety, which was not included in the schedule. *Averill v. Lyman.* 346
4. In an action upon the joint and several promissory note of A. and S., brought against both promisors, A. was defaulted, and S. set up, as a defence, an agreement made be-

tween him and the plaintiff, before the note became due, by the terms of which the plaintiff exonerated and discharged S. from the payment of one half of the note, upon his then paying the other half and receiving of the plaintiff, at par, a note of a third person indorsed without recourse to the plaintiff. It was *held*, that the agreement was founded on a good and sufficient consideration; and that it was a good defence to the action so far as respected S.; but that under *St. 1834, c. 189*, [Revised Stat. c. 100, § 7,] the plaintiff was entitled to judgment against A. *Goodnow v. Smith.* 414

REPLEVIN.

1. In replevin, the plea of *non cepit*, although it admits the property to be in the plaintiff, may nevertheless be joined with a plea of property in the defendant or another person. *Simpson v. M'Farland.* 427
2. Certain chattels which had been transferred by the defendant to the plaintiff by a deed of mortgage not duly recorded, were attached by an officer on a writ against the defendant in favor of one of his creditors. In replevin for the chattels, brought by the plaintiff against the defendant, it was *he'd*, that the plaintiff was not entitled to judgment, because there was no wrongful taking or detention by the defendant, but that the defendant was not entitled to a return, because, as against him, the plaintiff had a right to the chattels, although the mortgage was not recorded, and the defendant was not accountable for them to the officer or the creditor. *Ibid.*

SALE.

1. Goods consigned by the defendants to an auctioneer, were sold by him to the plaintiff, on the condition of sale, that no allowance should be made for damage unless applied for within three days from the sale, when the bills were to be settled. It was *held*, that the condition of sale limited the liability of the defendants for such damage, as well as of the auctioneers, to three days from the sale, notwithstanding the damage was not discovered till after the lapse of such time. *Stikins v. Howe.* 16
2. In an action by the plaintiff against the defendants to recover back the price of such goods, evidence to prove, that according to the custom of merchants, goods were returned by purchasers at auction to the owners, and received by them or allowances made, after the expiration of the three days, if within a reasonable time after the sale, was *held* to be inadmissible. *Ibid.*
3. *Held* also, that a purchaser was precluded from objecting, that the time limited in the conditions of sale was unreasonably short. *Ibid.*
4. Where a large number of barrels of mackerel branded, under the inspection laws, as No. 1 and No. 2 mackerel, were sold in the spring, it was *held*, that the description of them as such, in the bill of parcels, was not a warranty that the mackerel were free from rust, at the time of the sale, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2. *Winsor v. Lombard.* 57
5. T. being indebted to B., a contract was made between them, in September, as follows:—"I, B., agree to purchase and do hereby purchase of T." a certain quantity of cheese, "if he makes as much," and certain cattle, at fixed prices, "T. to keep the cattle on his farm free of expense until foddering time, if there cannot be any sale made that will answer before; the cheese to be kept until the 1st of November next, unless called for sooner; and for the payment of the amount of these articles B. is to discharge all

- the claims he may have against T., and the balance he is to pay in cash whenever demanded." It was *held*, that this was not a present sale, but that as the articles were from time to time delivered, the contract was *pro tanto* executed, and that the property in the articles not delivered remained in T. *Mason v. Thompson and Tr.* 305
- 6 Where the owner of a large number of barrels of beef, all of equal value and all in one parcel, sold a certain number of them to the plaintiff and received the price, and a certain number to B., and reserved the rest for himself, and delivered them all to the agent of the vendees, and afterwards B. took away the number sold to him, and the vendor took away the number reserved, it was *held*, that upon such separation the barrels remaining in the hands of such agent became vested in the plaintiff, and that he might consequently maintain trover therefor against a person who took away and converted the same. *Valentine v. Brown.* 549
7. If the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfil his contract. *Bowker v. Hoyt.* 555
- See FRAUD, 6, 8.*
LANDLORD AND TENANT.
- SCIRE FACIAS.
- 1 Where a writ of *scire facias* against a trustee has been lost, the plaintiff may be permitted to file a copy as a substitute. *Sturtevant v. Robinson.* 175
2. And if an office copy cannot be obtained for that purpose, the next best evidence is admissible: thus, where the plaintiff's attorney stated, in his affidavit, that he had made out a paper, partly from a *scire facias* against another trustee in the original suit, and partly from memory, and that he believed it was either an exact copy or substantially a copy of the lost writ, it was *held*, that leave of court to file such a paper as a substitute, might rightfully be granted. *Ibid.*
3. After the defendant in a *scire facias* has appeared and answered to the writ, it is too late for him to object that it did not designate any time and place for his appearance. *Ibid.*
- SET-OFF.
- In an action against two, by the administrator of an insolvent estate, upon a joint debt, the defendants are not entitled to set off their several claims, allowed by the commissioners of insolvency, against the insolvent estate. *Fuller v. Wright.* 403
- See LIMITATIONS, &c. 3.*
- SEAMAN
- See ASSIGNMENT, 3, 4.*
- SHERIFF.
- See ATTACHMENT, 4, 5, 6, 7.*
- SHIP.
- See TRUSTEE PROCESS, 8.*
- SLAVE.
- A citizen of any one of the United States where negro slavery is established by law, who comes into this State for any temporary purpose of business or pleasure, bringing a slave with him as a personal attendant, and stays some time, but does not acquire a domicile here

cannot restrain the slave of his liberty during his continuance here, and carry him out of this State against his consent. *Commonwealth v. Aves* 193

SPECIFIC PERFORMANCE.

See MORTGAGE, 6.

SPENDTHRIFT.

Under *St.* 1783, c. 38, § 7, providing that where any person, by excessive drinking, &c. shall endanger or expose "*the town to which he belongs*," to expense for his maintenance, the selectmen thereof shall make complaint to the judge of probate of the county to which the person *belongs*, and authorizing such judge thereupon to appoint a guardian to such spendthrift, the appointment of a guardian upon the complaint of selectmen of the town where the spendthrift was *domiciled*, was held valid although such spendthrift had his *legal settlement* in a town in a different county from that in which such appointment was made. *Stacey v. Benson.* 497

STATUTE.

The provision in Revised Stat. c. 112, § 14, giving costs to the party prevailing on a writ of error, was held not to apply to a judgment reversed after those statutes went into operation, on a writ of error brought before that event. *Gay v. Richardson.* 417

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- c. 146, § 5. Repeal of statutes 419, 532

TAX.

See DEVISE, &c. 4, 5.
VOTER.

TOWN.

1. A town is authorized to indemnify its officers, against any liability which they may incur in the *bonâ fide* discharge of their duties, although it turn out that they have exceeded their legal rights and authority. *Bancroft v. Lynnfield.* 566
2. Where a drain was dug by a surveyor of highways, for the purpose of raising a legal question as to the bounds of a highway, and the town appointed a committee to defend an action brought against the surveyor therefor, and voted to defray the expenses incurred by the committee, it was *held*, that the town was bound by such vote, although it were under no previous obligation to indemnify the surveyor, and that the committee were entitled to compensation and indemnity from the town, for their services and expenses. *Ibid.*

See POOR, 3, 6, 7.
WAY, 2, 3.

TRESPASS.

1. If the plaintiff in trespass *quare clausum* shows no title to the *locus in quo*, he cannot object that a deed under which the defendant claims title and holds possession, is invalid. *Brown v. Pinkham.* 172

TROVER.

In trover against two defendants, jointly, for a horse hired of the

plaintiff to go to a certain place, it is competent for the defendants to prove, that by a contract between them, one was to carry the other to such place as a passenger, there being no direct evidence of any express hiring by the latter. *Adams v. Graves.* 355

See LANDLORD AND TENANT, 2.

TRUST.

See ASSIGNMENT, 10.
CHARITY, 2, 3, 4.
DEVISE, &c. 3, 4, 5, 9.

TRUSTEE PROCESS.

1. A policy of insurance on a quantity of sugar belonging to F. was made payable to W. of London, as collateral security for advances made thereon by W. A loss having occurred, and having been paid to his agent in Boston, it was *held*, that the agent was accountable to his principal only, and not to F., for any money received by him under this policy, and consequently could not be charged therefor under the trustee process, as trustee of F. *Cramer v. Flint and Tr.* 140
2. The circumstance that, by a contract between the principal defendant and one summoned as his trustee, money due from the latter to the former is payable in another State, does not prevent it from being liable to attachment on the trustee process. *Sturtevant v. Robinson.* 175
3. Where a person owing money to the defendant, paid it over, without any authority, to a creditor of the defendant, and was then summoned as trustee of the defendant, and the defendant afterwards ratified the payment, it was *held*, that the ratification was ineffectual, and that the party summoned was chargeable as trustee. *Ibid.*
4. Where one summoned as trustee

made answer, that a debt was due from him to the defendant, but that he had verbally promised and he considered himself bound to pay a debt to a greater amount due from the defendant to a third person, it was *held*, that he was not obliged to set up the statute of frauds to avoid this promise, and that if he chose not to avail himself of it, he was not chargeable as trustee. *Cahill v. Bigelow and Tr.* 369

5. Where the defendant in a trustee process is defaulted at the return term, and the trustee appears at the same term and submits himself to an examination upon oath, and the case is continued in court for the purpose of determining whether he is chargeable or not, and he is ultimately discharged, he is entitled to tax costs for his travel and attendance, in the same manner as a prevailing party. *Crocker v. Baker and Trs.* 407

6. If a person summoned as trustee discloses, that he is indebted to the defendant and a third person jointly, without any thing further appearing, he is not chargeable; and if charged upon such answer, the joint creditors may question the judgment collaterally, and may recover the full amount of their claims against him without any deduction on account of such judgment. *Hawes v. Waltham.* 451

7. Where an action was referred under a rule of court, to referees, whose award was to be final, and an award was made in favor of the plaintiff before the service of a trustee process against the plaintiff as principal and the defendant as his trustee, it was *held*, that as the defendant had no opportunity to plead this attachment in bar of the first action, he was not chargeable as trustee. *M'Caffrey v. Moore and Tr.* 492

8. The shipper of goods on board a coasting vessel, is not liable, under the trustee process, to a credi-

tor of the master, for the amount of the freight, it appearing, that the master had no claim against the owners of the vessel, for his services, or otherwise. *Richardson v. Whiting and Trs.* 530

See ASSIGNMENT, 11.
MORTGAGE, 3.
SCIRE FACIAS, 1, 2, 3.

TURNPIKE ROAD

See WAY, 4, 6.

VERDICT.

See NEW TRIAL, 1, 2.

VISITOR.

See CHARITY, 3, 4.

VOTER.

After any general assessment of a tax has been made by the assessors of a town, and committed to the proper officer for collection, and before another tax is committed to the assessors to assess, they have no authority to assess a poll or other tax, on any person, for the purpose of enabling him to vote at an election; nor is any person, on the payment of a tax so assessed upon him, qualified to vote, according to the third article of amendments of the constitution. 575

WAIVER.

See PARISH.
SCIRE FACIAS, 3.

WATER-COURSE.

See CONVEYANCE, 5, 6, 8.

WAY.

1. Where public notice of a meeting of the county commissioners for the purpose of locating a highway and assessing the damages, was given in the manner prescribed by §4

- 1828, c. 103, § 3, [Revised Stat. c. 24, § 2, 6,] it was *held*, that it was sufficient as against the heirs of a person over whose land the highway was laid out, although such person died four days before the meeting, out of the Commonwealth, and none of the heirs resided, at that time, within the Commonwealth, or had actual notice. *Taylor v. County Commissioners of Hampden.* 309
2. It seems, that if the inhabitants of a town, in making a county road, deviate from the true location, they are estopped, in an action against them for an injury occasioned by its being out of repair, to deny their liability to maintain it as they have made it. *Williams v. Cunningham.* 312
3. The erection and support of a bridge by a town and the use of it by the public, for thirty-eight years, is sufficient proof of its existence as a highway, on the presumption of a laying out, a grant or a dedication, to render the town liable for an injury occasioned by its being out of repair. [And see Revised Stat. c. 25, § 26.] *Ibid.*
4. Under St. 1801, c. 125, § 6, [Revised Stat. c. 39, § 42,] a turnpike corporation is liable for damage sustained by a traveller in consequence of a defect in the road, although the defect was a latent one, and the corporation used due diligence to discover defects, and keep the road in repair. *Yale v. Hampden and Berkshire Turnp. Corp.* 357
5. A person, whose land was injured by the construction of a rail road through it, applied to the county commissioners to assess the damages; and the commissioners reported, that, it being understood and agreed by them, that the rail road corporation should construct a culvert, wasteway, &c. for his benefit, they had assessed the damages at the sum of \$500. Upon the acceptance of this report, the land owner applied for a jury, and obtained a verdict for the sum of \$600; but no reference was made in the verdict to the construction of a culvert, &c. The commissioners, thereupon, after hearing the parties, rendered judgment in favor of the land owner for the amount of the verdict, *but without costs*, on the ground that he had not obtained an increase of damages. It was *held*, that that part of the award of the commissioners relating to the construction of a culvert was not absolutely void, but might be rendered binding on the parties by ratification; and that the refusal of costs to the land owner, was not such a disregard of a plain duty, on the part of the commissioners, as would justify this Court in interfering by a writ of *mandamus*. *Morse, Petitioner, &c.* 443
6. Where a turnpike road is, by the assent of its proprietors, laid out by the county commissioners as a free public highway, (pursuant to St. 1833, c. 147; Revised Stat. c. 39, § 16 *et seq.*), the commissioners' allowance of damages to such proprietors is conclusive upon them and not subject to revision by a jury. *Andover &c. Turnp. Corp. v. County Commissioners of Middlesex.* 486
- See HUSBAND AND WIFE, 1.
JUDGMENT, 2.
LANDLORD AND TENANT, 1
LICENSE.
TOWN, 2.
- WILL.
1. A person under guardianship as *non compos mentis* may make a will, if he is in fact of sound mind at the time of its execution. *Breed v. Pratt.* 115
2. In the case of a will made by a person under guardianship as *non compos mentis*, appointing his guardian executor, and giving him a

legacy, the executor is not estopped, by the fact of his guardianship, from showing that the testator, at the time of making his will, was of sound and disposing mind and memory. *Ibid.*

9. Under such circumstances the fact of the testator's being under guardianship is *prima facie* evidence of insanity and incapacity to make a will, and therefore it is incumbent on the executor to show, beyond a reasonable doubt, that the testator had both such mental capacity and such freedom of will and action as are requisite to render a will legally valid. *Ibid.*

See DEVISE AND LEGACY.

WITNESS.

1. In assumpsit against several, who joined in a plea of *non assumpsit*, only one of them appeared when the case came on for trial. It was *held*, that this one was not legally entitled to have the others defaulted, in order that he might use them as witnesses. *Vinal v. Burrill.* 29
2. If one of several defendants in assumpsit be defaulted, it seems he is

not a competent witness for his co-defendants; being interested, not so much to throw on his co-defendants a portion of the demand in suit, as to reduce the plaintiff's recovery to a nominal sum. *Ibid.*

See EVIDENCE, 3, 4.
FRAUD, 7

WRIT.

Under *St.* 1833, c. 50, § 2, a petition for a new trial presented by a citizen of another State, after that statute went into operation, must be indorsed by some responsible citizen of this Commonwealth, although the action was tried before the passage of that statute, and the 6th section thereof provides, that it "shall not affect any rights and liabilities" existing under the provisions of law; and this Court is not authorized to grant the petitioner leave to furnish an indorser after such petition shall have been entered, for the statute being peremptory that it shall be indorsed, the provision in Revised Stat. c. 90, § 10, that this Court may in all cases require an indorser, does not apply. *Haywood v. Main.* 226

END OF THE EIGHTEENTH VOLUME.

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